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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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NO. PD-_____

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
11/7/2019
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
Petitioner

v.

KEVIN CASTANEDANIETO,
Respondent

From the Court of Appeals for the
Fifth District of Texas at Dallas
Cause Nos. 05-18-00870-CR, 05-18-00871-CR, and 05-18-00872-CR

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ATTORNEYS FOR THE STATE OF TEXAS

Oral argument requested

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Trial Judge:

The Honorable Andrew J. Kupper
Visiting Judge
363rd Judicial District Court
Dallas County, Texas

Parties:

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Statute

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

What is the court of appeals' job? The court of appeals must give deference to the trial court's factual findings that are supported by the record and review the legal significance of those facts de novo. In this case, the court of appeals inferred as a matter of fact that a confession was coerced – ignoring the legal test for coercion – from the facts implicitly found by the trial court. It then imputed that inference to a subsequent confession instead of applying the legal test for attenuation of taint. Because the court of appeals said that it was not its "job" to apply the legal tests this Court promulgated in *Sterling* and other cases, the State petitions for discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. The court of appeals decided that it did not have to apply the law to the trial court's implied resolution of the facts because the legal test for attenuation of taint this Court promulgated in *Sterling* only applies to appeals brought by the defendant. In a State's appeal, the court of appeals reasoned, the standard of review does all the work, and there is no need to weigh the relevant legal tests. This is either a new rule of appellate procedure or a complete departure from this Court's precedent and the precedent of every other court of appeals. Either way, this Court's opinion on discretionary review would necessarily speak to the State's right of appeal, the most frequently applied standard of review in criminal

appeals, and the very nature and role of the courts of appeals themselves. Oral argument would aid the Court in exploring all possible consequences of its opinion.

STATEMENT OF THE CASE

The State brought three charges of aggravated robbery against Kevin Castanedanieto. 1 CR: 10; 2 CR: 9; 3 CR: 9. [1] *See* Tex. Penal Code Ann. § 29.03(a)(2). The suppression issue in this case concerns the effect of one interview—during which Appellee was indisputably out of his mind on drugs—on a subsequent interview after the drugs had worn off. The State sought to admit only the second interview, in which Appellee confessed. RR: 44; State's Exhibit 1. The trial court suppressed the second interview. 1 CR: 107; 2 CR: 82 3 CR: 30; RR: 49. The trial court did not issue findings of fact and conclusions of law.

STATEMENT OF PROCEDURAL HISTORY

Over Justice Bridges's dissent, and by published opinion, the Fifth Court of Appeals affirmed the trial court's ruling granting Appellee's motion to suppress. *State v. Castanedanieto*, No. 05-18-00870-CR, 2019 WL 4875340, at *5 (Tex. App.—Dallas Oct. 3, 2019) (holding no abuse of discretion because the trial court could have found that both of Appellee's confessions were the result of coercion or

[1] The clerk's records are designated as "1 CR" for trial cause number F17-57212-X (appeal number 05-18-00870-CR); "2 CR" for trial cause number F17-57213-X (appeal number 05-18-00871-CR); and "3 CR" for trial cause number F18-00407-X (appeal number 05-18-00872-CR).

intimidation and that he was motivated at least in part by cat-out-of-the-bag thinking in the second interview); *see also* 2019 WL 4875340, *5-12 (Bridges, J., dissenting). The State did not file a motion for rehearing. The State's petition is due by November 2, 2019, and the State now submits this petition for discretionary review.

STATEMENT OF FACTS

Shortly after midnight on August 10, 2017, Appellee was arrested for four aggravated robberies. At approximately 3:00 a.m., he was interviewed for twenty-two minutes by Detective Thayer and confessed to the crimes of that night. At 7:36 p.m., he was arraigned and requested court appointed counsel. RR: State's Exhibit 2; Defendant's Exhibit A. On August 11, 2017 at 12:21 p.m., the trial court appointed counsel who subsequently declined the appointment. RR: State's Exhibit 3. Around "dinner time" that same day, Appellee was interviewed by Detective Garcia and confessed to additional crimes as well as those discussed in the first interview. On August 14, 2017, Appellee was again appointed trial counsel, who filed an omnibus pretrial motion stating in relevant part, "Defendant requests a hearing prior to the introduction of any statements allegedly made by the Defendant, either orally or in writing, to determine the admissibility of same. Tex. Code Crim. Prod. [sic.] Ann. article [sic.] 38.22, 38.23." RR: State's Exhibit 4; 1 CR: 58, 63; 2 CR: 57, 62. At a pretrial hearing, the State clarified that it only intended to offer Appellee's second confession. Appellee argued that the second confession was tainted because he

lacked "full understanding" of his *Miranda* rights during the first confession, and that the detectives violated his Sixth Amendment right to counsel. RR: 10-12, 35-42. The next day, the court considered the State's motion to reconsider, and suppressed the second confession. 1 CR: 107; 2 CR: 82; 3 CR: 30; RR: 49.

GROUNDS FOR REVIEW

1. **Under the *Calloway* rule, is police coercion of a confession a "theory of law applicable to the case" where the appellee argues that he lacked a "full understanding" of his *Miranda* rights in a different statement?**[2]

2. **In reviewing a trial court's ruling on a motion to suppress, the reviewing court must give deference to the trial court's resolution of the facts and review de novo the legal significance of those facts. May the court of appeals infer that a confession is involuntary as a matter of fact instead of applying the relevant legal test to the facts supported by the record?**[3]

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[2] Appellee's specific objection was:

> As to confession number 1, our client didn't demonstrate a full awareness of the rights he was waiving and meaning of the waiver of those rights… we carry 1 over to number 2, but additional grounds for number 2 is the state reinitiated contact, not the defendant, and therefore, that confession is inadmissible.

RR: 10-12. Appellee argued, in relevant part:

> We are talking about whether the defendant understands his rights and the consequences of waiving them…Now, that applies to the second confession in the following way: My client didn't gain an understanding of what he was doing under the Constitution in the intervening hours between confession 1 and confession 2. So the Miranda warnings given by the second detective don't cure the problem that we had from the first…Under the circumstances we have, the police cannot reinitiate contact with the defendant after he has been interviewed and after he has been arraigned and appointed a lawyer.

RR: 35-42.

3. **In deferring to the trial court's implied resolution of the facts, must the court of appeals ignore indisputable video evidence that the defendant affirmatively waived his *Miranda* rights?[4]**

ARGUMENT

Ground 1: The law is not clear on whether police coercion is a theory of law applicable to the case when the Appellee raises the issue of understanding and awareness.

Voluntariness of a confession has two distinct dimensions – one of coercion and one of understanding and awareness. This Court has determined that for a defendant claim coercion on appeal, he must first claim that he was, in fact, coerced. *See Wolfe v. State*, 917 S.W.2d 270, 282 (Tex. Crim. App. 1996) ("Once this testimony was given, appellant had an obligation to at least *allege* to the trial court that he was in custody, or that his confession was not freely given because of coercion or some other specific reason, in order to raise the issue of voluntariness.").

Here, the issue of police coercion was first addressed in the oral argument before the court of appeals.[5] It was never claimed or argued at the trial or appellate level, yet the court of appeals inferred coercion in both confessions based on the

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[3] *Castanedanieto*, 2019 WL 4875340, at *4

[4] RR: Defense Exhibit 1 at 2:59-3:24; State's Exhibit 1at 7:33-7:59.

[5] Oral Argument at 16:32, *Castanedanieto*, 2019 WL 4875340, *available at* http://www.search.txcourts.gov/Case.aspx?cn=05-18-00870-CR&coa=coa05.

standard of review. Is the State now required to prove an absence of police coercion when the defendant only raises his understanding of *Miranda*? Case law involving jury instructions and preservation of appellate review suggests the answer is "no."[6] But the court of appeals said, "yes," and this court has never addressed whether coercion is a theory of law applicable to the case for purposes of the *Calloway* rule.

This Court has noted that a theory of law for which the State bears the burden of proof cannot be "applicable to the case" unless the State was "fairly called upon" to adduce evidence on it during the suppression hearing. *State v. Esparza*, 413 S.W.3d 81, 90 (Tex. Crim. App. 2013). If the State was never confronted with its burden under a particular theory of law, an absence of evidence does not justify the trial court's ruling. *Id.* The "correct under any applicable theory of law" rule does not authorize a court of appeals to apply theories that the defendant had the burden to initially raise, were advanced in neither the trial court nor the court of appeals, and were not factually contested, to uphold the trial court's ruling that coercion is probably such a theory. *See Vasquez v. State*, 483 S.W.3d 550, 556 (Tex. Crim. App. 2016) (finding that the appellant's written motion to suppress based on Article 38.22,

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[6] S*ee also Oursbourn v. State*, 259 S.W.3d 159, 171–72 (Tex. Crim. App. 2008) (not entitled to jury instructions unless the trial court is made aware of coercion claim); *Sanders v. State*, 715 S.W.2d 771, 777 (Tex. App.—Tyler 1986, no pet.)(failure to raise a voluntariness claim of a written confession when client could not read or write was ineffective assistance of counsel).

and unclear comments did not preserve a two-step interrogation complaint). But this Court has never interpreted the *Calloway* rule in this context. An opinion from this Court would clarify exactly what litigants need to do at these hearings, and which cases are worth appealing, and to what extent the court of appeals can expand the question before it.

Ground 2: May the court of appeals infer that a second confession is involuntary as a matter of fact instead of applying the relevant legal test to the facts supported by the record?

The legal test for attenuation of taint from one interview to the next comes from *Sterling v. State*, 800 S.W.2d 513 (Tex. Crim. App. 1990). In *Sterling*, this Court stated the factors to be weighed in evaluating attenuation included consideration of the break between interviews, was Miranda warnings given, who initiated the contact, and whether the same condition rendering the first confession persisted through later questioning, and other relevant circumstances.[7] *Id*. at 519-20. This Court emphasized that these factors were to be weighed under a totality of

[7] Other relevant circumstances include the following considerations: was the defendant taken before a magistrate to be warned of his rights between confessions; was there particular evidence that defendant's latter confession was motivated by the desire to exculpate himself; rather than by any earlier improper influences brought to bear on him, did the defendant remain in custody between confessions; did the defendant confer with counsel between confessions, or make any kind of request for counsel; and was there particular evidence to suggest that defendant was motivated by "cat out of the bag" thinking – i.e. that he gave the second confession when he otherwise might not have because he had already given the first one.

the circumstances examination with no one factor dispositive of the determination. *Id*.

For the first time since *Sterling*, the court of appeals declined to analyze the totality of the circumstances with proscribed factors to determine whether the trial court abused its discretion. *Castanedanieto*, 2019 WL 4875340, at *4. Can a court of appeals refuse to apply a legal test like the *Sterling* factors to determine if the trial court abused its discretion? This Court should grant review to answer this question because the published opinion of the court of appeals abrogates the State's right to a de novo review of the relevant law and calls into question the proper role of the court of appeals. Moreover, the published opinion sews confusion by either contradicting this Court's precedent or creating a new rule just for State's appeals.

A. The court of appeals abrogated the State's right to appeal a suppression ruling by issuing a published opinion holding that factual deference is dispositive of State's appeals, while defendants' appeals benefit from de novo review of the legal significance of the facts.

The court of appeals recognized that the *Sterling* factors govern when a criminal defendant complains a latter confession was tainted by a prior one. *Castanedanieto*, 2019 WL 4875340, at *4. However, the court of appeals refused to apply *Sterling* because it determined that the standard of review, which requires deferring to the trial court's resolution of the facts, eliminated the need for a de novo

review of the legal significance of the facts.[8] *Id*. As Justice Bridges states in his dissent, "This [c]ourt has followed *Sterling*, and the majority fails to explain why we should not consider each factor in a totality of the circumstances review." *Castanedanieto*, 2019 WL 4875340, at *10.

Despite acknowledging the *Sterling* factors as the relevant legal test, the court of appeals refused to apply them. In a footnote, it explained why: "That's not our job." *Castanedanieto*, 2019 WL 4875340, at *4 n.9. If the court of appeals is right, and it is not the job of the court of appeals to apply the law de novo to the facts found by the trial court, what is the job of the court of appeals? In light of the court of appeals' published opinion, the answer to that question is ambiguous. This Court should grant review to correct the notion that courts of appeals do not have to apply the law promulgated by this Court.

B. Is there a split of authority? Or a different rule for State's appeals? There have been few *Sterling* cases over the last 25 years, and the lower courts need to know what to do.

The court of appeals' published opinion either contradicts this Court's precedent and the published case law from the other courts of appeal, or it announces

[8] "[T]he party with the burden of proof assumes the risk of nonpersuasion. If this party loses in the trial court and the trial court makes no explicit fact findings, then this party should usually lose on appeal." *Castanedanieto*, 2019 WL 4875340, at *2 (*quoting State v. Kelly*, 204 S.W.3d 808, 819 (Tex. Crim. App. 2006)).

a new rule that only applies in State's appeals. *Castanedanieto*, 2019 WL 4875340, at *4. Understandably, Justice Bridges explicitly asked this Court to clarify this point in his dissent:

> This [c]ourt has followed *Sterling*, and the majority fails to explain why we should not consider each factor in a totality of the circumstances review. I recognize few cases have considered the *Sterling* factors, and those cases involve a defendant's appeal of the trial court denying a motion to suppress rather than a State's appeal. However, to agree with the majority eviscerates appellate review for the State when the trial court concludes the taint from a first confession is not sufficiently attenuated to and suppresses the second confession. If the majority is correct and the State is not entitled to meaningful review of the *Sterling* factors, then I respectfully encourage the [C]ourt of [C]riminal [A]ppeals to clarify the standard."
>
> *Id*. at *10.

Admittedly, *Sterling* is 25 years old. There are no opinions from this Court deliberately applying *Sterling* to State's appeals.[9] This Court has not entertained a *Sterling* case since Sterling itself. If *Sterling* is no longer the rule, or if it only applies to defendant's appeals, the parties and the lower courts statewide need to know. If

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[9] The only cases that cite to Sterling have not applied the factors. *State v. Rosenbaum*, 910 S.W.2d 934, 948 (Tex. Crim. App. 1994), on reh'g (Dec. 6, 1995) (Keller, J., concurring opinion, noting the Court's vote in the *Sterling* case.); *State v. Consaul*, 960 S.W.2d 680, 688 (Tex. App.—El Paso 1997), *pet. dism'd improvidently granted*, 982 S.W.2d 899 (Tex. Crim. App. 1998) (*citing Sterling* where unequivocal invocation of *Miranda* rights must be imputed to all representative of the State in order to preserve the efficacy of the suspect's rights).

Sterling is still the rule, and the benefit of de novo review of the legal significance of the facts extends to defendant and State appellants equally, this Court should correct the court of appeals' published opinion to the contrary. To leave the court of appeals' opinion in place without clarification would wreak havoc on the jurisprudence of the State.

Ground 3. Whatever deference the court of appeals gives to the trial court's assessment of the demeanor and credibility of fact witnesses, it cannot dismiss indisputable video evidence when analyzing factors that do not turn on credibility and demeanor.

Some of the *Sterling* factors are binaries that generally do not turn on credibility and demeanor if there is video evidence: Was the defendant given renewed *Miranda* warnings? Did the defendant request counsel? If the State is entitled to meaningful review of the *Sterling* factors, can the reviewing court ignore uncontroverted indisputable video evidence of those factors? In that instance, the reviewing court "is in no worse position to determine fact issues presented by the tape than is a trial court." *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000); *see also Montanez v. State*, 195 S.W.3d 101, 113 (Tex. Crim. App. 2006) (Johnson, J., dissenting). In this case, in an effort to give total deference to the trial court, the court of appeals disregarded uncontroverted, indisputable video evidence that Appellant waived his *Miranda* rights in the first interview, received new *Miranda* warnings in the second interview, and unequivocally waived them again.

RR: Defense Exhibit 1 at 2:59-3:24; State's Exhibit 1at 7:33-7:59. This Court has observed that indisputable video evidence can limit the facts that can be inferred to support a trial court's ruling. *Carmouche*, 10 S.W.3d at 332.

The majority opinion dedicated a footnote to the explaining that the law is unclear in regard to indisputable video evidence. *Castanedanieto*, 2019 WL 4875340, at *1 n.3. It cited *Montanez*, which divided this Court on the issue on how video evidence fits into the standard of review. *See Montanez*, 195 S.W.3d at 105–113 (Tex. Crim. App. 2006) (Keasler, J.) (Meyers, J., dissenting) (Womack, J., dissenting) (Johnson, J., dissenting). As a result, the majority and the dissent disagreed "which standard of review" applies in this case. *Castanedanieto*, 2019 WL 4875340, at *1 n.3; *id*. at 6, 8 (Bridges, J., dissenting).

Because the majority opinion did not review the legal significance of the facts, it treated the video evidence as if it had to indisputably refute the trial court's ultimate ruling to be considered at all, rather than considering the individual facts that the video indisputably showed to see if they affected the legal analysis. *See id.* at *1 n.3 (quoting *State v. Gobert*, 275 S.W.3d 888, 892 n.13 (Tex. Crim. App. 2009), regarding deference to the trial court's *finding*). The majority concluded that *Guzman* deference controlled, so it did not have to consider the indisputable video evidence.

The dissent concluded that the indisputable video evidence rule is a different standard of review, and the proper standard to apply in this case. *Castanedanieto*, 2019 WL 4875340, at *8-10. Moreover, the dissent noted that the implied finding of coercion, if correct, could only be implied as to the first interview — the court must then evaluate attenuation of the taint to determine the admissibility of the second interview, the evidence the state intended to offer. *Castanedanieto*, 2019 WL 4875340, at *8. Most of the attenuation factors do not depend on credibility or demeanor. The dissent therefore considered condition changes, time between interviews, renewed *Miranda* warnings, and who initiated the interview, and other circumstances such as Appellee's arraignment between interviews, exculpating statements of Appellee, whether Appellee requested counsel, and Appellee's access to food and drink. Neither opinion below treated the indisputable-video-evidence rule as flowing from or fitting into the *Guzman* standard.

Since *Montanez*, this Court has granted review in cases with the potential to illustrate the application of the indisputable video evidence rule under the *Guzman* standard, but the facts of those cases have fallen short. In *Duran*, the real issue was whether the Court had the discretion to disbelieve the officer's testimony that he saw for himself in real time what was indisputably depicted in the video. *State v. Duran*, 396 S.W.3d 563, 573–74 (Tex. Crim. App. 2013).. The trial court has that discretion. *Id.* In *Cortez*, this Court twice granted review, only to determine that the purported

indisputable video evidence was not indisputable at all—the video was inconclusive on the discrete fact at issue. *State v. Cortez*, 543 S.W.3d 198, 205 (Tex. Crim. App. 2018); *State v. Cortez*, 501 S.W.3d 606 (Tex. Crim. App. 2016); *see also Gobert*, 275 S.W.3d at 892 n.13. *Miller* provided an example where the trial court entered discrete fact findings that could be expressly compared to a video. *Miller v. State*, 393 S.W.3d 255, 263–65 (Tex. Crim. App. 2012). These cases do not tell appellate courts how to evaluate truly indisputable video evidence when deferring to the trial court's implied resolution of the facts. As the conflict between the published majority and dissenting opinions in this case demonstrates, the courts of appeals feel they lack guidance on how the indisputable video evidence rule fits into the *Guzman* standard with implied fact findings.

The *Guzman* standard is the most frequently applied standard of review in criminal appeals. Video evidence is becoming more and more prevalent, particularly in the suppression context where recorded police interactions are nearly always at issue. As momentous as *State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006), was when it acknowledged the losing party's the right request written findings of fact fifteen years ago, many appeals involving suppression issues simply do not have findings. It's a procedural posture the courts of appeals see over and over again, and they cannot be left unguided on the proper interaction between the indisputable-video-evidence rule and the standard of review.

This case gives this Court the opportunity to clarify that the indisputable-video-evidence rule is a particular application of the *Guzman* standard of review. For any discrete fact issue, truly *indisputable* video evidence is what makes the fact one that does not "turn on credibility and demeanor" under the *Guzman* standard, even if the trial court has not entered findings. *Carmouche*, 10 S.W.3d at 332. In choosing this case to make this point, the Court could illustrate the indisputable-video-evidence rule in the context of the multi-factor test for attenuation where factors turn on credibility and demeanor, and others do not. An opinion evaluating each factor with the appropriate deference would provide several examples of the proper interplay between the indisputable-video-evidence rule and the *Guzman* standard, thus providing a lucid roadmap for courts of appeals deciding any suppression issue with video evidence.

PRAYER FOR RELIEF

The State asks this Court grant discretionary review of the court of appeals' published decision and set this case for submission on briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the forgoing petition, inclusive of all contents, is 3,858 words in length, according to Microsoft Word, which was used to prepare the petition, and that the foregoing petition complies with the word-count limit and typeface convention required by the Texas Rules of Appellate Procedure.

/s/ M. Paige Williams
M. Paige Williams

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief was served on Allan Fishburn, attorney for Respondent, via electronic service to allanfishburn@yahoo.com and on the State Prosecuting Attorney via electronic service to information@spa.texas.gov, on November 1, 2019.

/s/ M. Paige Williams
M. Paige Williams

APPENDIX: (Opinion of the Court of Appeals)

Affirmed; Opinion Filed; October 3, 2019

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00870-CR
No. 05-18-00871-CR
No. 05-18-00872-CR

THE STATE OF TEXAS, Appellant
V.
KEVIN CASTANEDANIETO, Appellee

On Appeal from the Criminal District Court No. 6
Dallas County, Texas
Trial Court Cause Nos. F17-57212-X, F17-57213-X & F18-00407-X

OPINION

Before Justices Bridges, Partida-Kipness, and Carlyle
Opinion by Justice Carlyle

On the court's own motion, we withdraw our October 2, 2019 memorandum opinion and vacate the judgment of that date. The following is now the court's opinion.

The State appeals the trial court's order suppressing appellee Kevin Castanedanieto's statement. For the reasons that follow, we affirm.[1]

The law

We review a trial court's ruling on a motion to suppress for an abuse of discretion and apply a bifurcated standard of review. *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016);

[1] Though the State's sole issue on appeal is multifarious, we consider it and the differing legal bases the State offers in support. *See* TEX. R. APP. P. 38.9; *cf.* TEX. R. APP. P. 38.1(f), (i).

State v. Aguilar, 535 S.W.3d 600, 604 (Tex. App.—San Antonio 2017, no pet.). We view the evidence in the light most favorable to the trial court's ruling, giving almost complete deference to the court's determination of historical facts that the record supports, especially those based on credibility or demeanor assessments.[2] *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010); *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). We review with this deference even in cases involving video evidence. *Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006). That is because our system does not require parties to "concentrate their energies and resources on persuading the trial judge" only to start over on appeal, treating the trial proceedings as a "tryout," and requiring parties to "persuade three more judges at the appellate level." *Id.* (citing and quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985)).[3]

We afford that same deference regarding the trial court's "application of law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor." *Crain*, 315 S.W.3d at 48. For a mixed question of law and fact that does not depend on credibility or demeanor evaluation, we "may conduct" de novo review. *Id.* "The winning side is afforded the 'strongest legitimate view of the evidence' as well

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[2] We note that, because the court granted suppression, it was not required to issue findings of fact and conclusions of law and we need not remand for the court to take that action. *See* TEX. CODE CRIM. PROC. art. 38.22, § 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 . . . as to whether the statement was made under voluntary conditions."); *see also State v. Perez*, No. 14-16-00690-CR, 2017 WL 5505855, at *9 (Tex. App.—Houston [14th Dist.] Nov. 16, 2017, no pet.) (mem. op., not designated for publication) (concluding article 38.22 requires trial court to file findings and conclusions "*only if* it decides that the statement is voluntarily made" (emphasis added)).

[3] *Montanez* groups *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000), as part of a line of cases rendering our law "somewhat unclear as to which standard of review" applies to video evidence in motion to suppress cases. *Montanez*, 195 S.W.3d at 108. The court of criminal appeals then clarified as cited above. *Id*. at 109.

The CCA has since cited *Carmouche* for part of the proposition that the dissent asserts, that we cannot ignore indisputable video evidence. *State v. Duran*, 396 S.W.3d 563, 570 n.20 (Tex. Crim. App. 2013). But the CCA has also stated that deference to the trial court is appropriate when video evidence did "not indisputably refute the trial court's finding." *State v. Gobert*, 275 S.W.3d 888, 892 n.13 (Tex. Crim. App. 2009). In line with the CCA, we believe *Duran* and *Gobert* can coexist and that the *Gobert* explanation of *Montanez* most closely tracks the situation in this case, requiring us not to "second-guess the trial court's determination of the facts." *See Duran*, 396 S.W.3d at 571 n.21; *see also State v. Hummel*, No. 05-11-00833-CR, 2012 WL 3553383, at *3 (Tex. App.—Dallas Aug. 17, 2012, pet. ref'd) (not designated for publication) (affirming trial court's grant of motion to suppress when video showed traffic stop that was basis of arrest).

as all reasonable inferences that can be derived from it." *Duran*, 396 S.W.3d at 571 & n.23 (citing *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011); *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011)).

We review the trial court's legal ruling de novo unless the implied factual findings supported by the record are also dispositive of the legal ruling. *State v. Kelly*, 204 S.W.3d 808, 819 (Tex. Crim. App. 2008). "[T]he party with the burden of proof assumes the risk of nonpersuasion. If this party loses in the trial court and the trial court makes no explicit fact findings, then this party should usually lose on appeal." *Id*. We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case, even if the trial court gave the wrong reason for its ruling.[4] *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003).

The facts

Castanedanieto was eighteen years old, an immigrant from El Salvador some five years prior, and did not graduate high school. He made two custodial post-arrest statements. He made the first to Detective Thayer shortly after arrest, around 3:00 a.m., and made the second to Detective Garcia the next day, around dinner time. The record includes video recordings of both statements. The State sought to admit only the second statement.

Detective Thayer began the first interrogation by saying, "I'm working on this case . . . kind of a mess, huh? Kind of a mess. *We'll talk about it here in a minute*." Shortly thereafter, Detective Thayer was authoritative, using gestures as he spoke: he told Castanedanieto, "take your arms out

[4] When the record is silent on the reasons for the trial court's ruling, or when there are no explicit fact findings and neither party timely requested findings and conclusions from the trial court, we imply the necessary factual findings that support the trial court's ruling if the evidence, viewed in the light most favorable to the ruling, supports those implied findings. *See Garcia-Cantu*, 253 S.W.3d at 241 (citing *Kelly*, 204 S.W.3d at 819). The dissent seeks to apply its interpretation of the evidence below instead of implying the necessary findings to support the trial court's ruling.

of your shirt . . . it's a respect thing though, right, *cause we're gonna have a conversation* and *we're gonna be truthful with each other*."

During the first four minutes of the video, Detective Thayer asked Castanedanieto several background questions. Thayer then read Castanedanieto his *Miranda* rights in English. When he asked Castanedanieto if he understood the rights he read to him, Castanedanieto tilted his hand back and forth. The detective asked, "A little bit?" to which Castanedanieto nodded his head and explained that he did not speak a lot of English. When Castanedanieto indicated that he could read Spanish, Detective Thayer had him read the *Miranda* card in Spanish.[5]

After Castanedanieto read the card out loud and was asked if he understood, Castanedanieto, looking down at the table, moved his head slightly. The detective then asked Castanedanieto if he was willing to talk to him, at which point he looked up at Detective Thayer and uttered "um." As Castanedanieto looked back down at the table, Detective Thayer continued, saying, "to try to figure this all out." Castanedanieto then looked up at the detective while tapping and rubbing his cheek with his hand and said, "It's 'cause—um—I don't understand." Detective Thayer then declared, "Ok, let's talk about what happened tonight," to which Castanedanieto responded, "Yes, sir." Castanedanieto answered Detective Thayer's questions for the next twenty-two minutes.

The next day Detective Garcia took his turn interrogating Castanedanieto. Garcia testified he was investigating crimes similar to those for which Castanedanieto and his cohort were arrested. Detective Garcia went to the jail and asked Castanedanieto if he would come to police headquarters for an interview. Castanedanieto agreed. Detective Garcia got him food from McDonald's and

[5] The dissent seems to divine meaning from the circumstances that Castanedanieto seemed to understand English well enough before the *Miranda* warnings, that he spoke in English, and that his lawyer did not require an interpreter at the suppression hearing. In doing so, the dissent steps outside the proper standard of review and works to reweigh and recategorize the evidence before the trial court piece by piece. If that were our function here, we may well agree with the dissent. But in this case, we must defer to the trial court's factual conclusions to the extent they implicate these circumstances, even if implied.

brought him back to the interrogation room, where he was allowed to eat before the detective conducted the interrogation. They spoke in English. It is not clear what Detective Garcia knew of Castandanieto's prior interrogation, though he certainly knew it had occurred and that Castanedanieto had confessed to certain things.

As the video played at the hearing, Garcia explained to the trial court that during the initial questioning while he was trying to get to know Castanedanieto, he had no concerns about Castanedanieto's understanding of what he was saying and that Castanedanieto responded properly to his questions. The video depicts Garcia asking Castanedanieto about the police in El Salvador. Castanedanieto responded they are "not good." Garcia then declared, "Basically, we're gonna go over everything that you talked about with the other detective and now that you've had a couple of days to think about stuff, maybe you might remember something that you didn't, or you might have some questions of your own for me that I'll try to answer."

After Garcia finished reading Castanedanieto his *Miranda* rights and asked him if he understood the rights he read to him, Castanedanieto responded "Yes" and nodded his head. Detective Garcia also testified he did not promise Castanedanieto anything in exchange for the statement, nor did he threaten or coerce him into giving him a statement. That said, Garcia bought Castanedanieto McDonald's for dinner, which was not insignificant to the eighteen-year-old. Castanedanieto ate the food and commented that he hoped it would not prove to be his last hamburger for awhile. Garcia attempted to downplay Castanedanieto's concern and continued with his interrogation.

After watching the two interrogation videos, and after hearing Garcia testify regarding his interaction with Castanedanieto, the trial court suppressed the second video interrogation.

Application of law to facts

The State asserts in its issue that the trial court erred in suppressing Castanedanieto's second statement because that statement "was given knowingly, intelligently, and voluntarily," and Castanedanieto's "Fifth and Sixth Amendment rights to counsel were not violated." Based on our abuse-of-discretion review, we conclude the trial court's ruling is supported by the record.

The trial court could have based its suppression in part on the continued behavior of law enforcement figures declaring to Castanedanieto that he would speak to them in the interrogation setting. The evidence supports an inference that Detective Thayer's declarative statements set the tone for an expectation that Castanedanieto would speak to authorities that overbore Castanedanieto's will and made his statements involuntary. Thayer told Castanedanieto twice that he would be talking to the detective and then, despite going through the motion of providing *Miranda* warnings in English and Spanish, despite Castanedanieto expressing hesitation by acts and words, failed to elicit any verbal or non-verbal assent to waiving those rights. Instead, he said, "Ok, let's talk about what happened tonight." Castanedanieto responded "Yes, sir" and went on to tell on himself extensively. The very next day, Detective Garcia came calling and, though to a lesser extent than Thayer, he too *declared* to Castanedanieto that he would talk. Further, Detective Garcia reminded Castanedanieto of his interrogation and confession the day before, suggesting he may have more to tell the second time around. This reference to the former confession gave the trial court sufficient basis to have concluded that Castanedanieto's second confession was motivated, if only in part, by so-called cat-out-of-the-bag thinking.[6]

[6] In *United States v. Bayer*, 331 U.S. 532, 540–41 (1947), Justice Jackson wrote,

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

The court of criminal appeals has set forth a list of factors and guiding principles to govern courts' analysis of the situation we have here, when a criminal defendant complains a latter confession was tainted by a prior one. *See Sterling v. State*, 800 S.W.2d 513, 519–20 (Tex. Crim. App. 1990) (factors to be considered when determining whether a former confession's illegality tainted a later one are: (1) whether the condition rendering the first confession inadmissible persisted through later questioning; (2) the length of the break in time between the two confessions; (3) whether the defendant was given renewed *Miranda* warnings; (4) whether the defendant initiated the interrogation which resulted in the later confession; and (5) "any other relevant circumstances," including whether a magistrate warned defendant of his rights between confessions, whether the defendant's latter confession was motivated by earlier improper influences brought to bear on him, whether the defendant remained in custody between the confessions, whether the defendant conferred with counsel between confessions or requested counsel, and whether the defendant gave the second confession when he otherwise might not have because he had already given the first one).[7]

From an analytical standpoint, *Sterling* involved the opposite (and much more common) procedural situation from this case—a criminal defendant's appeal from the denial of his motion to suppress. The CCA held the trial court's denial of suppression of Sterling's first confession to be error that, upon further analysis, was harmless in light of the proper admission of his subsequent confession. *Id.* at 518. The first detective in that case unquestionably misled Sterling in a way clearly prohibited by law. *Id.* at 515, 518. The second detective in *Sterling* did not compound the

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We refer to this line of cases as a potential basis for the trial court's action, as we must in our role as an appellate court. It is not to be read as some broadening of the cat-out-of-the-bag theory, which is distinctly cabined as a basis in Texas law for either (1) suppression in the trial court or (2) reversing the denial of suppression.

[7] The CCA borrowed this framework from the Seventh Circuit, which formulated it in response to a criminal appellant's complaint that, "had he known that his first confession would be suppressed he would not have made the later incriminating statements, but having once let 'the cat out of the bag' remaining silent during the later interrogation appeared to be an exercise in futility." *Holleman v. Duckworth*, 700 F.2d 391, 396 (7th Cir. 1983).

error the first detective made by making similar promises to Sterling. Also, he came from a different law enforcement agency, did not question Sterling about the prior confession, nor "did he use this confession to elicit the latter confession from appellant." The second detective said he knew nothing about the earlier improper statements to Sterling. And, finally, Sterling never invoked his *Miranda* rights, clearly waiving them each time he was warned. *Id.* at 515, 520.

Here, the trial court *granted* the motion to suppress. We could easily write the opinion affirming the trial court's action had it *denied* Castanedanieto's motion to suppress. But we just as easily affirm the grant of the motion to suppress because of the wide discretion a trial court has in making this decision. We stress that the video is not the only piece of evidence the trial court evaluated here. Detective Garcia testified at the hearing, providing testimony regarding his visit to Castanedanieto at the county jail, his invitation back to police headquarters, his offer to buy Castanedanieto dinner, and the substance of their conversation during those events. Garcia discussed their lack of speaking any Spanish to one another, as well as his perception that Castanedanieto knew and understood English.[8] The trial court had full discretion to assess Garcia's credibility and to view his demeanor. And, nothing in either video goes so far as to become "indisputable video evidence" of Castanedanieto's voluntariness to speak, given what we infer the

[8] Garcia testified, and the dissent notes, that Castanedanieto used the slang word, "strap" in place of "gun" as some indication he was ingrained into the culture of the United States. In the procedural posture of reviewing the grant of suppression, though we consider the use of English, we believe it is not dispositive of the State's claim that the trial court abused its discretion. *See also* note 5 *supra*. There is a legitimate view of the evidence supporting affirmance, expressed by Castanedanieto's relatively recent immigration, his education level, and his lawyer's explanation that this was a comprehension issue, which was borne out by Castanedanieto's on-the-spot statement in the first interview: "it's 'cause—um—I don't understand." Separately, the trial court would not have abused its discretion to minimize the importance of Castanedanieto using slang and conclude that the young man perhaps latched on to slang as a way of inculcating himself into a new culture.

If, in five years after moving to a foreign country whose primary language was not one's mother tongue, a young man finds himself in police custody in that foreign country, we cannot say it would be unreasonable to conclude one did not feel he fully comprehended a legal warning like the *Miranda* warning. The facts of this case at least allow, though they may not demand, a conclusion that this is what courts refer to when they speak of the "compulsion inherent in custodial surroundings." *See Miranda v. Arizona*, 384 U.S. 436, 458 (1966). Nothing in this record indisputably overcomes a conclusion that Castanedanieto felt this inherent compulsion and attempted, but was thwarted in his attempt, to remain silent.

trial court concluded about the first confession and what it could have inferred about Garcia and the second confession. Nothing in the second video indisputably demonstrates Castanedanieto was not under the influence of the detectives' declarations that he *would* speak to them or that he was not motivated at least in part by cat-out-of-the-bag thinking.[9]

We note that in *Oregon v. Elstad*, the Supreme Court walked back its recognition of the cat-out-of-the-bag theory as a basis for excluding confessions. *See* 470 U.S. 298, 314 (1985). The Court in *Elstad* said "the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id*. And, administering *Miranda* warnings to a "suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id*. In those circumstances, the "finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id*.

But *Elstad*'s "may reasonably" language does not require appellate courts reviewing a grant of suppression to reverse if the court can reweigh the facts in a way that may warrant a conclusion that denying the motion was possible.[10] Our function in this case is to review the trial court's actions for an abuse of discretion. We must examine the video evidence to determine if it renders certain facts or circumstances indisputable, but are not to act as if the trial court

[9] Again, we need not approve the trial court's conclusion as the one we necessarily would have made, but cite this path of legal analysis as a potential basis for suppressing the confession that was not an abuse of discretion. *See Stevens*, 235 S.W.3d at 740 (courts of appeals may affirm for any applicable legal theory if trial court's decision is supported by the record); *see also* note 6 *supra*. The dissent reweighs each *Sterling* factor, suggesting a different answer to the analysis. That is not our job here.

[10] We note that case law suggesting limited application of a sound theory of human behavior does not render it forever impotent. We suggest the cat-out-of-the-bag theory here only as one potential alternate basis a trial court could have relied on in this situation where we affirm its order. Thus, in this case, we conclude the trial court did not abuse its discretion by suppressing the second confession and that cat-out-of-the-bag thinking was an acceptable part of the reason for that conclusion.

proceedings were just a tryout. *See Montanez*, 195 S.W.3d at 109 (citing and quoting *Anderson*, 470 U.S. at 574–75).[11]

On this record, we conclude the trial court did not abuse its discretion by granting Castanedanieto's motion to suppress his second statement. We affirm the trial court's order.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

Bridges, J., dissenting

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[11] *See McPherson v. Rudman*, No. 05-16-00719-CV, 2019 WL 3315453, at *3 (Tex. App.—Dallas July 24, 2019, order) (Schenck, J., concurring on denial of en banc reconsideration) ("[W]e cannot function like an instant replay booth." (citing *Michigan v. Lucas*, 500 U.S. 145, 155 (1991) (Stevens, J., dissenting) ("We sit, not as an editorial board of review, but rather as an appellate court. Our task is limited to reviewing 'judgments, not opinions.'")).

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE STATE OF TEXAS, Appellant	On Appeal from the Criminal District Court No. 6, Dallas County, Texas
No. 05-18-00870-CR V.	Trial Court Cause No. F17-57212-X.
KEVIN CASTANEDANIETO, Appellee	Opinion delivered by Justice Carlyle, Justices Bridges and Partida-Kipness participating.

Based on the Court's opinion of this date, the trial court's order is **AFFIRMED**.

Judgment entered this 3rd day of October, 2019.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE STATE OF TEXAS, Appellant	On Appeal from the Criminal District Court No. 6, Dallas County, Texas
No. 05-18-00871-CR V.	Trial Court Cause No. F17-57213-X.
KEVIN CASTANEDANIETO, Appellee	Opinion delivered by Justice Carlyle, Justices Bridges and Partida-Kipness participating.

Based on the Court's opinion of this date, the trial court's order is **AFFIRMED**.

Judgment entered this 3rd day of October, 2019.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE STATE OF TEXAS, Appellant	On Appeal from the Criminal District Court No. 6, Dallas County, Texas
No. 05-18-00872-CR V.	Trial Court Cause No. F18-00407-X.
KEVIN CASTANEDANIETO, Appellee	Opinion delivered by Justice Carlyle, Justices Bridges and Partida-Kipness participating.

Based on the Court's opinion of this date, the trial court's order is **AFFIRMED**.

Judgment entered this 3rd day of October, 2019.

DISSENT and Opinion Filed October 3, 2019

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00870-CR
No. 05-18-00871-CR
No. 05-18-00872-CR

THE STATE OF TEXAS, Appellant
V.
KEVIN CASTANEDANIETO, Appellee

On Appeal from the Criminal District Court No. 6
Dallas County, Texas
Trial Court Cause Nos. F17-57212-X, F17-57213-X & F17-18-00407-X

DISSENTING OPINION

Opinion by Justice Bridges

I withdraw my October 2, 2019 dissenting opinion. This is now my dissenting opinion.

This State's appeal involves whether the trial court properly granted appellee's motion to suppress a second videotaped oral statement to police. Appellee presented two arguments to the trial court supporting suppression: (1) appellee's first confession to police was involuntary because he did not understand his *Miranda* rights; therefore, his second confession was tainted; and (2) officers violated his Sixth Amendment right to counsel by conducting the second interview. Because the record establishes sufficient attenuating circumstances between the confessions to remove any alleged taint, the trial court abused its discretion by suppressing appellee's second confession. Accordingly, I would reverse the trial court's order and remand for further proceedings. I respectfully dissent from the majority opinion.

Background

Appellee was arrested on August 10, 2017 for four aggravated robberies arising from two criminal episodes involving different victims. He was indicted on three charges in which he allegedly exhibited a handgun while in the course of committing theft.

At approximately 3:00 a.m. on August 10, 2017, Detective Thayer[1] advised appellee of his *Miranda* rights and conducted a custodial interview. Detective Thayer then interviewed appellee for approximately twenty-two minutes. Appellee admitted consuming alcohol, marijuana, and cocaine prior to the crime spree and claimed not to remember some details. He admitted to touching a gun and firing it once in the air, but denied ownership of the gun or shooting it toward a white truck. He recalled stealing two cell phones from two women at different apartment complexes, but he threw them away. At the end of the interview, Detective Thayer explained appellee would appear before a judge who would talk to him and explain the charges. Detective Thayer reiterated appellee could obtain a lawyer.

A magistrate arraigned appellee at 7:36 p.m. that evening. Appellee requested a court-appointed attorney.

On August 11, 2017, at 12:21 p.m., the trial court appointed counsel; however, counsel declined the appointment. The record does not indicate the time counsel declined the appointment. Around "dinnertime," Detective Olegario Garcia transported appellee from jail to the police station for questioning. Detective Garcia removed appellee's handcuffs and let him eat food from McDonald's before the interview. Appellee received *Miranda* warnings again and willingly participated in the interview.

Appellee's counsel, who accepted the appointment on August 14, 2017, filed an omnibus pretrial motion requesting, among other things, a hearing prior to the introduction of any

[1] His full name is not reflected in the record.

statements allegedly made, either orally or in writing, "to determine the admissibility of same," citing Texas Code of Criminal Procedure articles 38.22 and 38.23.

During the suppression hearing, the State communicated it was offering only the second confession and not the first confession. Appellee, however, argued suppression of the second interview was appropriate because (1) the second interview was inadmissible based on taint from the first interview in which he involuntarily waived his *Miranda* rights, and (2) Detective Garcia violated his Sixth Amendment right to counsel. The State again emphasized it was not trying to admit or rely on the first interview because appellee admitted he consumed alcohol and drugs earlier in the evening. Rather, the State sought to admit the second interview, which appellee voluntarily participated in after any effects of the drugs had worn off.

At the conclusion of the hearing, the trial court recessed and resumed the following day. The record does not contain an order on appellee's motion to suppress prior to the recess; however, the trial court clearly granted it in light of the trial court reconvening the following day to consider the State's motion to reconsider. Following further arguments from both sides, the trial court orally granted the motion to suppress and signed an order.

Standard of Review

A trial court's denial of a motion to suppress is reviewed under a bifurcated standard of review. *Brodnex v. State*, 485 S.W.3d 432, 436–37 (Tex. Crim. App. 2016). We afford almost complete deference to the trial court's determination of historical facts, "especially if those are based on an assessment of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). However, when, as here, we have a videotape of the confessions and an uncontroverted version of events, we review the trial court's ruling on an application of law to facts de novo. *See Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000) (refusing to turn a blind eye to videotape evidence presenting "indisputable visual evidence" contradicting

portions of officer's testimony when evidence in videotape did not "pivot 'on an evaluation of credibility and demeanor'"); *see also Nunez v. State*, No. 05-08-00711-CR, 2009 WL 1677821, at *3 (Tex. App.—Dallas June 17, 2009, pet. ref'd) (not designated for publication); *Herrera v. State*, 194 S.W.3d 656, 659 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). When, as in this case, the trial court does not make express findings of fact, we view the evidence in the light most favorable to the trial court's rulings and assume it made implicit findings supported by the record.[2] *Brodnex*, 485 S.W.3d at 436. We sustain the trial court's decision if we conclude the decision is correct under any applicable theory of law. *Id*. at 437.

Voluntariness of the Confessions

The State has the burden of showing that a defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 444, 475 (1966); *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010). The State must prove waiver by a preponderance of the evidence. *Joseph*, 309 S.W.3d at 24. "A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475. But a waiver need not assume a particular form and, in some cases, a "waiver can be clearly inferred from the actions and words of the person interrogated." *Joseph*, 309 S.W.3d at 24–25 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

The question, however, is not whether appellee "explicitly" waived his *Miranda* rights, but whether he did so knowingly, intelligently, and voluntarily. *Id*. at 25. To evaluate whether appellee knowingly, intelligently, and voluntarily waived his *Miranda* rights, a reviewing court

[2] Because the majority agrees with the trial court's implicit finding that appellee's statements were involuntary, we need not abate the appeal for the mandatory findings required pursuant to Texas Code of Criminal Procedure, article 38.22, section 6. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 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 . . . as to whether the statement was made under voluntary conditions."); *see also State v. Perez*, No. 14-16-00690-CR, 2017 WL 5505855, at *9 (Tex. App.—Houston [14th Dist.] Nov. 16, 2017) (mem. op., not designated for publication) (concluding article 38.22 requires trial court to file findings and conclusions "*only if* it decides that the statement is voluntarily made") (emphasis added).

determines whether (1) the relinquishment of the right was voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and (2) the waiver was made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Id*. (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that a defendant waived his *Miranda* rights. *Id*. The "totality-of-the-circumstances approach" requires the consideration of "all the circumstances surrounding the interrogation," including the defendant's experience, background, and conduct. *Id*.

The videotape reveals that after Detective Thayer gave appellee *Miranda* warnings, the following exchange occurred:

> Thayer: Do you understand the rights I have read to you?
>
> Appellee: (waves his hand sideways)
>
> Thayer: A little bit. Ok. Well.
>
> Appellee: It's 'cause [sic] I don't, I don't speak a lot of English.
>
> Thayer: Do you, can you read Spanish?
>
> Appellee: Yes.
>
> Thayer: Read that for me and tell me if you understand.
>
> Appellee: (reads the *Miranda* warnings aloud in Spanish)
>
> Thayer: Ok do you understand?
>
> Appellee: (shakes head affirmatively)
>
> Thayer: Ok. Are you willing to talk to me try to figure this all out?
>
> Appellee: Which one? It's 'cause [sic] I don't understand.
>
> Thayer: Let's talk about what happened last night.
>
> Appellee: Yes, sir.

Detective Thayer then continued with the interview for approximately twenty-two minutes. During the interview, appellee conceded he made bad decisions but stated, "I'm telling you the truth" and "let me tell you the truth" when Detective Thayer asked him about the events of the evening.[3]

The majority emphasizes Detective Thayer's "declarative statements" and "gestures" to reinforce its conclusion that appellee did not fully comprehend his rights or consequences of abandoning them. Chastising the officer for using a declaratory sentence when questioning a suspect is adding a layer of review unsupported by Texas case law. Whether Detective Thayer "was authoritative, using gestures" during the interview might be relevant to our inquiry if appellee had argued, which he did not, that his confession was the result of coercion, intimidation, or deception. Regardless, Detective Thayer did not raise his voice or physically intimidate appellee in any way. Nothing in his demeanor or tone reflects intimidation. More importantly, the majority fails to explain how Detective Thayer's statements directing appellee that they "were gonna have a conversation, be truthful with each other" reveals appellee's lack of understanding of his *Miranda* rights.

The majority concludes Detective Thayer went "through the motion of providing *Miranda* warnings" but failed to "elicit any verbal or non-verbal assent." However, the "indisputable visual

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[3] During the suppression hearing, it appears appellee's counsel played only the first four minutes of the first interview. He replayed the portion of the video where appellee said, "I don't understand," and said, "We can stop it there. I rest." The following exchange then occurred:

Court: Okay. The question was, "You want to talk to me?" "I don't understand."

Defense: Yes, sir.

State: The question actually was, "You willing to talk to me and try to figure this all out?" He says, "It's because I do not understand."

Court: "Because I do not understand."

Defense: Does not understand.

Court: Uses the word "because?"

State: He says, "It's 'cause.'"

Court: "It's 'cause."

State: After the question, "Do you understand?" Then he nods in the affirmative. Then it's the "figure out" part.

Court: Okay.

evidence" confirms that when Detective Thayer asked appellee if he understood his *Miranda* rights, appellee nodded affirmatively. *See Carmouche*, 10 S.W.3d at 332 (refusing to turn a blind eye to indisputable video evidence); *see also Montanez v. State*, 195 S.W.3d 101, 113 (Tex. Crim. App. 2006) (Johnson, J., dissenting) (noting a trial court can glean demeanor and assess credibility from language and tone of witnesses during the suppression hearing, but videotapes are a different matter as "they are what they are" and an appellate court "is in no worse position to determine fact issues presented by the tape than is a trial court"). To the extent appellee verbalized he did not understand after Detective Thayer asked him if he was "willing to talk . . . to figure this all out," the record is unclear about what appellee did not understand. However, the trial court could not have implicitly found appellee involuntary waived his *Miranda* rights because he did not understand English. The trial court asked at the beginning of the suppression hearing if appellee needed an interpreter, and defense counsel answered, "No, it's not that bad, Judge." Appellee's counsel emphasized during the hearing, "we're not talking about a language barrier. We're talking about whether or not the defendant understands his rights and the consequences of waiving them." Further, Detective Garcia testified he did not have any issues communicating with appellee in the second interview. The videotape of the second interview confirms his testimony. In fact, Detective Garcia testified appellee used the slang word for gun (a "strap") during the interview, which indicated he was "ingrained into the culture of the United States."

I recognize our review of the video is somewhat limited because in answering the issue of knowing and voluntary waiver we must consider Detective Thayer's demeanor in asking the questions and appellee's demeanor in answering those questions. *See, e.g., Armendariz v. State*, No. 08-13-00125-CR, 2015 WL 2174481, at *4 (Tex. App.—El Paso May 8, 2015, pet. ref'd) (not designated for publication). I likewise acknowledge we are required to give almost total deference to the trial court's determination of demeanor even when that determination is based on a video

recording. *See State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). Thus, giving almost complete deference to the trial court's determination of historical facts, "especially if those are based on an assessment of credibility and demeanor," I must defer to the trial court's implicit finding that appellee's lack of understanding referred to his *Miranda* rights. *See Crain*, 315 S.W.3d at 48.

This, however, does not end the analysis. To determine whether the first confession's inadmissibility tainted the second confession, a reviewing court considers the following factors: (1) did the condition rendering the first confession inadmissible persist through later questioning; (2) how long was the break in time between the two confessions; (3) was the defendant given renewed *Miranda* warnings; (4) did defendant initiate the police interview which resulted in the later confession; and (5) "any other relevant circumstances." *Sterling v. State*, 800 S.W.2d 513, 519 (Tex. Crim. App. 1990). "Other relevant circumstances" include (6) was the defendant taken before a magistrate to be warned of his rights between confessions; (7) was there particular evidence that defendant's later confession was motivated by a desire to exculpate himself, rather than by any earlier improper influences brought to bear on him; (8) did the defendant remain in custody between the confessions; (9) did the defendant confer with counsel between confessions, or make any kind of request for counsel; and (10) was there particular evidence to suggest that defendant was motivated by "cat out of the bag" thinking—i.e., he gave the second confession when he otherwise might not have because he had already given the first one. *Id*. at 519–20.

The majority acknowledges the *Sterling* factors as "guiding principles to govern courts' analysis of the situation we have here" but then glosses over them without meaningful analysis. As detailed below, my review of the undisputed facts in light of the *Sterling* factors indicates appellee's second confession was not tainted by the first.

Notwithstanding my review of the first confession in which appellee affirmatively nodded his head when asked if he understood the *Miranda* rights he had read out loud in Spanish, but instead deferring to the trial court's implicit finding to the contrary, the record indicates a change in conditions from the first confession to the second confession.

Approximately one and a half days passed between appellee's first and second confession giving him time to eat, drink, and reflect on his situation. *See id*. at 520 (considering passage of one day between confessions and defendant's ability to eat, drink, and reflect as factors favoring second confession not tainted by first).[4] *Cf. McBride v. State*, 803 S.W.2d 741, 746 (Tex. App.—Dallas 1990, pet. dism'd) (concluding evidence showing a two-hour break between first and subsequent confession during which time defendant was unable to sleep weighed against attenuation). More importantly, the passage of time allowed any effects of drugs and alcohol to wear off that may have hindered appellee's ability to fully appreciate a voluntary waiver of his *Miranda* rights in the first interview.

The State introduced an arraignment sheet indicating appellee went before a magistrate at 7:36 p.m. on August 10, 2017, and the magistrate "in clear language informed the person arrested" of his *Miranda* rights—a fact the majority omits. Thus, appellee received *Miranda* warnings again approximately sixteen hours after his first interview and twenty-four hours before his second interview, in which he was yet again Mirandized before Detective Garcia proceeded with the second interview. Although *Miranda* warnings alone are not enough to attenuate taint, it is an important factor weighing in favor of attenuation. *See McBride*, 803 S.W.2d at 746 (noting a "fresh set of *Miranda* warnings alone are not determinative"); *see also Perkins v. State*, 779

[4] Although the Texas Court of Criminal Appeals has included a defendant's ability to eat between confessions as a factor favoring admissibility of a second confession, the majority insinuates that the officers' purchase of a McDonald's hamburger overpowered his ability to stay silent.

S.W.2d 918, 922 (Tex. App.—Dallas 1989, no pet.) (same). Here, the record establishes appellee received *Miranda* warnings two additional times between his first and second interviews.

Of the first four *Sterling* factors, only the fourth weighs against attenuation because appellee did not initiate the second interview.

As for "other relevant circumstances," as noted above, appellee was taken before a magistrate and warned of his rights between confessions. The record contains no "particular evidence" suggesting appellee was motivated by "cat out of the bag thinking."[5] *See Griffin v. State*, 765 S.W.2d 422, 430 (Tex. Crim. App. 1989) ("The mere possibility such a 'psychological disadvantage was at work . . . absent some evidentiary corroboration is insufficient to rebut the State's otherwise adequate showing of voluntariness."). Detective Garcia's comment at the beginning of the second interview that "basically we are going to go over everything that you talked about with the other detective . . . ," without more, is no evidence that appellee was prompted by "cat out of the bag thinking." *See Bell v. State*, 724 S.W.2d 780, 793 (Tex. Crim. App. 1986) (observing that "[t]he workings of the human mind are too complex to infer such a motivation without any objective evidence thereof").[6] The majority emphasizes that nothing in the second video demonstrates appellee was *not* motivated at least in part by "cat out of the bag thinking." This approach contradicts *Sterling*'s directive that when considering the "cat out of the bag

[5] The "cat out of the bag" theory stems from Justice Jackson's opinion in *United States v. Bayer*, 331 U.S. 532, 540–41 (1947):

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

Here, the arrest warrant indicates officers engaged in a car chase with appellee, who was a passenger. Inside the vehicle, officers recovered two cell phones and a wallet with one victim's identification and credit cards. This "particular evidence" supports the theory appellee was motivated to engage in a second interview not because of some psychological influence from his previous confession but because he knew officers caught him with stolen property fleeing the scene near the robberies.

[6] At 1:28:14 of the 1:30:14 interview, appellee stated, "If I got out I can work and help pay, 'cause [sic] bro, like I said to the other officer, if I can get out I will pay for them." Given that this isolated statement referring to the first interview occurred at the end of an hour and a half long interview, I cannot infer the statement amounts to "particular evidence" supporting "cat out of the bag" motivation.

thinking" factor, the reviewing court considers whether the record includes particular evidence of a defendant's motivation to give a second confession. 800 S.W.2d at 520. The *absence* of such particular evidence cannot support the majority's conclusion that "cat out of the bag thinking" was an "acceptable part" of the court's reasoning for granting the motion to suppress. Moreover, this Court has recognized that the "cat out of the bag" theory has limited value with respect to adult offenders. *B__A__G__ v. State*, 715 S.W.2d 790, 793 (Tex. App.—Dallas 1986), *rev'd on other grounds by Griffin*, 765 S.W.2d at 430.

Finally, there is some "particular evidence" appellee's second confession was motivated by a desire to exculpate himself because he included self-serving statements. For example, when Detective Garcia asked appellee if he fired a gun, appellee said, "I don't remember it real good, but I was there but I wasn't shooting nobody." When describing the incident in which appellee said the white truck tried to "roll over" him, he told Detective Garcia "the other guy" told him, "Hey, shoot the car and I was like drunk and everything and I shoot. . . . I didn't mean to do that but the other guy told me and I was like drunk." *See, e.g., Sterling*, 800 S.W.2d at 520 (second confession may have been motivated by desire to exculpate himself when he said, "I was just going to rob her" and "I wasn't intended to kill her or anything like that" [sic]).

That appellee remained in custody and did not consult with counsel militates against admissibility, but these two factors do not outweigh the strong indications that appellee voluntarily gave his second confession. Considering the totality of the circumstances and weighing the *Sterling* factors, I would conclude any implied taint from the first confession was attenuated prior to appellee's second confession.[7]

[7] It is noteworthy that in *Sterling*, the defendant had an IQ of 69 yet the court of criminal appeals, applying the factors, concluded any taint from a first interview was attenuated from a subsequent interview. *Sterling*, 800 S.W.2d at 518, 520.

The majority indicates it is "not our job" to reweigh each *Sterling* factor. This is exactly what the court of criminal appeals requires when a criminal defendant complains a later confession is tainted by a prior one. Such review of the evidence is not treating the trial court as a "try out" or functioning as an "instant replay booth."[8] This Court has followed *Sterling*, and the majority fails to explain why we should not consider each factor in a totality of the circumstances review. *See McBride*, 803 S.W.2d at 745–46.[9] I recognize few cases have considered the *Sterling* factors over the past twenty-five years, and those cases involve a defendant's appeal of the trial court denying a motion to suppress rather than a State's appeal. However, to agree with the majority eviscerates appellate review for the State when a trial court concludes the taint from a first confession is not sufficiently attenuated and suppresses the second confession. If the majority is correct and the State is not entitled to a meaningful review of the *Sterling* factors, then I respectfully encourage the court of criminal appeals to clarify the standard.

The trial court has broad discretion in its rulings, but its rulings are not unfettered. Here, any alleged taint from appellee's first confession was removed before his second confession; therefore, the State proved, by a preponderance of the evidence, that appellee knowingly, intelligently, and voluntarily waived his *Miranda* rights. *Joseph*, 309 S.W.3d at 24 (State must prove waiver by a preponderance of the evidence). Accordingly, the trial court abused its discretion by granting appellee's motion to suppress.

Sixth Amendment Right to Counsel

Because I conclude the trial court could not have suppressed appellee's second confession because it was involuntary, I must now determine whether the trial court could have suppressed

[8] *See* majority opinion page 2 and footnote 11.

[9] Other courts of appeals have likewise engaged in such analysis. *See, e.g., Brown v. State*, No. 07-03-00347-CR, 2005 WL 1742984, at *5 (Tex. App.—Amarillo July 25, 2005, no pet.) (mem. op., not designated for publication); *Ikes v. State*, No. 01-96-01540-CR, 1998 WL 734014, at *3 (Tex. App.—Houston [1st Dist.] Oct. 22, 1998, pet. ref'd) (mem. op., not designated for publication).

the second confession based on appellee's Sixth Amendment right to counsel. *See Armendariz*, 123 S.W.3d at 404 (reviewing court must uphold trial court's ruling if supported by the record and correct under any theory of law applicable to the case).

During the suppression hearing, appellee argued his Sixth Amendment right to counsel attached once he requested an attorney during his arraignment; therefore, the subsequent police-initiated interview without a lawyer violated his constitutional right. He relied on *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989), in which the court held a defendant's unilateral wavier of his Sixth Amendment right to counsel during interrogation, without his defense attorney, was invalid even if he received *Miranda* warnings. *Id*. ("Only through notice to defense counsel may authorities initiate the interrogation of an indicted and represented defendant."). The State argued, as it does on appeal, that *Holloway* is no longer the applicable law after the United States Supreme Court's decision in *Montejo v. Louisiana*, 556 U.S. 778 (2009), which the Texas Court of Criminal Appeals applied in *Pecina v. State*, 361 S.W.3d 68 (Tex. Crim. App. 2012). I agree.

Before the United States Supreme Court's decision in *Montejo*, a distinction was drawn between the waiver of a Fifth Amendment right to interrogation counsel and a Sixth Amendment right to trial counsel. *See Pecina*, 361 S.W.3d at 74–78. Under the prior law, when an attorney-client relationship was established after a defendant's Sixth Amendment right to counsel attached, the police could initiate an interrogation only through notice to defense counsel. *See Holloway*, 780 S.W.2d at 794. After *Montejo*, however, both the Fifth and Sixth Amendment rights to counsel during custodial interrogation are "waived in exactly the same manner." *Pecina*, 361 S.W.3d at 70. Therefore, when law enforcement officers approach a defendant and provide him with *Miranda* warnings, the defendant must invoke his Sixth Amendment right to counsel at that time. *Id*. at 78. As the *Montejo* court concluded:

> Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial

> interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. . . . Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment [citations omitted], it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached.

Montejo, 556 U.S. at 794–95.

Here, the record is clear appellee requested an attorney during magistration; however, this invocation of his right to counsel "says nothing about his possible invocation of his right to counsel during later police-initiated custodial interrogation." *Pecina*, 361 S.W.3d at 78. Rather, if the evidence establishes appellee invoked his right to counsel after being read his *Miranda* warnings in the second interview, then the trial court's ruling could still be upheld because appellee's statements would have been taken in violation of his right to counsel. *Id.*; *see also State v. Reising*, No. 04-16-00794-CR, 2017 WL 4518287, at *2–3 (Tex. App.—San Antonio Oct. 11, 2017, no pet.) (mem. op., not designated for publication) (applying *Pecina* and reversing trial court's order granting motion to suppress when record did not support an unequivocal request for counsel). The record does not support such a conclusion. Detective Garcia read appellee his *Miranda* warnings at the beginning of the interview. "That [was] the time and place to either invoke or waive the right to counsel for purposes of police questioning." *Pecina*, 361 S.W.3d at 78. Appellee did not invoke his right to counsel but instead said he understood his rights and was willing to talk. Thus, he waived his Sixth Amendment right to trial counsel. Accordingly, to the extent the trial court suppressed appellee's second confession based on a Sixth Amendment right to counsel violation, it abused its discretion.

Conclusion

Because the trial court's order cannot be upheld under any law applicable to the case, I would reverse the trial court's order suppressing appellee's second confession and remand for further proceedings.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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