PD-0745-23
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/8/2024 7:29 PM
Accepted 3/12/2024 9:36 AM
DEANA WILLIAMSON
CLERK

Nos. PD-0745-23, PD-0746-23, PD-0727-23

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/12/2024
DEANA WILLIAMSON, CLERK

EMANUEL OCHOA, Appellant

v.

STATE OF TEXAS, Appellee

Appeal from Cooke County
Appeal Nos. 02-21-00174 through 00176-CR
Trial Causes CR-19-0054, CR-19-00056, CR-19-00057

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STATE'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES, COUNSEL, AND JUDGES

* The parties to the trial court's judgment are the State of Texas and Appellant, Emanuel Ochoa.

* The judge was the Hon. Janelle M. Haverkamp, Presiding Judge, 235th Judicial District Court, Cooke County, Texas.

* Appellant was represented at trial and on appeal in the Court of Appeals and this Court by Jeromie Oney of Switzer | Oney Attorneys at Law, P.O. Box 2040, Gainesville, Texas 76241, 940-665-6300, jeromie.oney@thesolawfirm.com.

* Appellant was also represented at trial by Marcus Olds of Olds & Brown Attorneys & Counselors at Law, PLLC.

* The State was represented at trial and in the Court of Appeals by Assistant District Attorney Eric Erlandson of the Cooke County District Attorney's Office.

* The State was also represented at trial by District Attorney John D. Warren and Assistant D.A. Olivia A. Neu, also of the Cooke County District Attorney's Office

* Counsel for the State before this Court is Emily Johnson-Liu of the Office of State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711, (512) 463-1660, information@spa.texas.gov.

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STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The state-law positive promise standard for confessions should not and need not be lessened for juveniles. It applies only when there is a claim that a law-enforcement promise alone renders the confession inadmissible. Given that the claim itself is divorced from the greater context, it makes sense to require that there be a definite and unambiguous *quid pro quo*. The

availability of other state and federal general voluntariness claims, which consider the totality of the circumstances, already take a juvenile's youth into consideration. And there are still other, better tools to address the reliability of juvenile confessions. Modifying this more-than-a-century-old standard is unlikely to aid that goal. Here, there was no positive promise, and under a totality of the circumstances, his confession was voluntarily made.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been granted, and the State requests the opportunity to participate.

STATEMENT OF THE CASE

Appellant Emanuel Ochoa was charged with aggravated sexual assault of a child, injury to a child, and aggravated kidnapping.[1] He moved to suppress his oral statement, which the trial court denied after an evidentiary hearing. 54CR 118 (motion); 3 RR 4-96 (hearing); 5 RR 7 (ruling). A jury convicted Appellant of all three offenses and assessed 45-, 55-, and 20-year

[1] 54CR at 10; 56CR at 10; 57CR at 10. References to the clerk's record is by the last two digits of the trial cause number. Where the documents are identical in each record, reference is made only to the CR-19-00054 Clerk's Record for simplicity.

sentences and a $10,000 fine in each case. 10 RR 10. The court of appeals rejected his induced confession claim on the basis that the Ranger did not make him an unqualified promise. *Ochoa v. State*, 675 S.W.3d 793, 811-12 (Tex. App.—Fort Worth 2023, discretionary review granted). This Court granted review of the following issues on its own motion:

ISSUES

(1) Whether the Ranger made a positive promise to Appellant under *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1994), when he said that "there's no reason on this deal why you shouldn't be adjudicated as a juvenile. And what that means is they're going to get you help. You're not going off to prison or anything horrible like that."

(2) Whether the "positive promise" standard of *Garcia* applies to juveniles?

(3) Whether the totality of the circumstances in this case rendered Appellant's statement involuntary?

STATEMENT OF FACTS[2]

A five-year-old girl went missing from the home Appellant shared with

[2] It appears the trial court did not make written findings as required under TEX. CODE CRIM. PROC. art. 38.22, § 6; *Sandoval v. State*, 665 S.W.3d 496, 519–20 (Tex. Crim. App. 2022). No one at the court of appeals level refers to them. An abatement may not be necessary, however, as the parties' focus is on what the Ranger and magistrate said and when, which is on video, SX 2. Appellant did not testify at the

more than a dozen people. 3 RR 43. She was found underneath a nearby mobile home, partially clothed and suffering from hypothermia.

Appellant and his mother went to the police station for an interview. 3 RR 44. He was not handcuffed and waited in a public area, unaccompanied by law enforcement. *Id*. Texas Ranger James Holland finished interviewing another resident and, after getting his mother's permission, spoke with Appellant in an interview room.[3] 3 RR 45-46.

Initial Interview (5:48 pm- 7:07pm)

Because Appellant was 14, the Ranger spoke slower and avoided mere "yes" or "no" questions to be sure Appellant understood him. 3 RR 42. Ranger Holland built up his role as a Texas Ranger and crime solver. He indicated the governor had personally asked him to investigate the 5-year-old's disappearance and that he would stay until "this whole thing is done." SX 2 at 5:51. He told Appellant that he was not under arrest, could leave whenever

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suppression hearing; the parties argued for different conclusions from an essentially agreed set of facts. 3 RR 77-91.

[3] When the Ranger interviewed Appellant, he had seen the victim in the back of the ambulance and knew Appellant and a thirty-year-old man who lived in the house had discovered her. 6 RR 301-304. He had suspicions that she may have been sexually assaulted but he did not know that for a fact or that anyone had struck her or used a ligature on her neck. 3 RR 72.

he wanted, could say he didn't want to talk, or just grab the doorknob (on the other side of the empty chair) anytime and walk out. 3 RR 46; *Id*. at 5:54. He told Appellant that, as one of the people living in the house, he probably had information that could help solve the case, but that he didn't have to talk and could be silent. SX 2 at 5:53-54. The Ranger said he just wanted to solve the case and go home, and they shared a joke that Appellant surely wanted to help the Ranger go home, as a still frame from that moment in the video shows:

SX 2 at 5:54. The Ranger told Appellant he was free to go visit with his mom anytime he wanted, leave for the bathroom, get a soda, and do anything but

break down the wall or things like smoking a cigarette because he wasn't old enough—"plus it's bad for your health." *Id*. at 5:54. Appellant affirmed that he knew he could leave whenever he wanted and did not have to talk to the Ranger. *Id*. at 5:55. Appellant "seemed actually excited to talk" to the Ranger. 3 RR 48.

Appellant told him about who was in the home the night before the victim was discovered missing but denied knowing what happened to her. SX 2 at 5:56. The Ranger explained that there could be non-criminal reasons why she ended up under the trailer and asked Appellant if he knew of any reason. Appellant responded, "No, well, she is a troublemaker," which the Ranger found revealing. SX 2 at 6:00. He explained that she was sometimes disobedient but had not been that night. *Id*. Appellant readily explained where everyone was the day and night before the victim's disappearance but did not otherwise connect what her troublemaking had to do with her being under the trailer. He confirmed for the Ranger that no one had come in the house that night through the family room where he slept because he would have heard it. *Id*. at 6:00-6:13. He said someone the next day said she was not there at the home, and they all went looking for her. His older sister heard

her around a nearby trailer, and Appellant ultimately found her (with her pants off and a bag around her from the waist down) shaking badly. *Id*. at 6:16. When the Ranger asked Appellant what he thought happened to her, Appellant responded "hopefully, uh, she did not get raped because, you know, her pants were not there." *Id*. Appellant said that she and the area around her (gesturing downward) smelled like Pine-sol. *Id*. at 6:18. Ranger Holland started to tell Appellant about Freudian slips before shifting gears and explaining that, while everyone makes mistakes, he only respected people who admitted their mistakes, took responsibility, and made amends.

The Ranger explained that when his own son (a year younger than Appellant) admitted the "dumbest" mistakes and said he was sorry, he usually did not even punish his son. *Id*. at 6:21. He established that Appellant was Catholic, as he was, and that you have to confess your sins to be forgiven. *Id*. He suggested that Appellant had made a mistake in relation to the girl and Appellant looked at the Ranger incredulously and said, "What?"

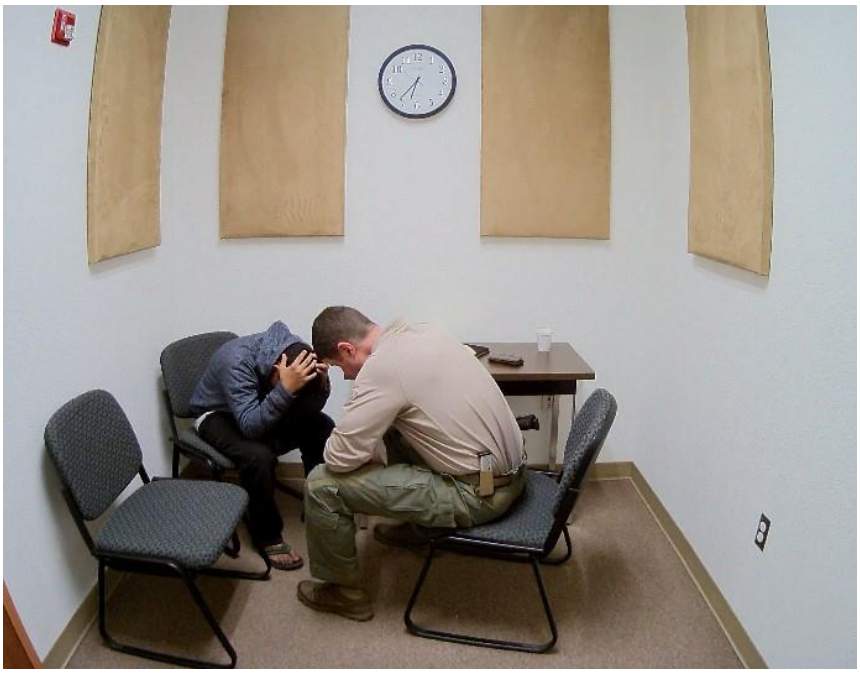
SX 2 at 6:27. He then denied having made any mistake and explained that he hardly ever spoke to the girl. *Id*. at 6:28.

Ranger Holland asked Appellant about the stains on his pants, which Appellant explained came from bleach about three weeks earlier. *Id*. at 6:30. The Ranger spoke more softly and told Appellant that things "get so much worse" when people lie instead of admitting their mistakes. The Ranger said he could help Appellant but that he needed to be honest. He told Appellant that the victim was alive and talking and that Appellant needed to admit his mistake from the outset. The Ranger said, "I know you didn't mean to hurt

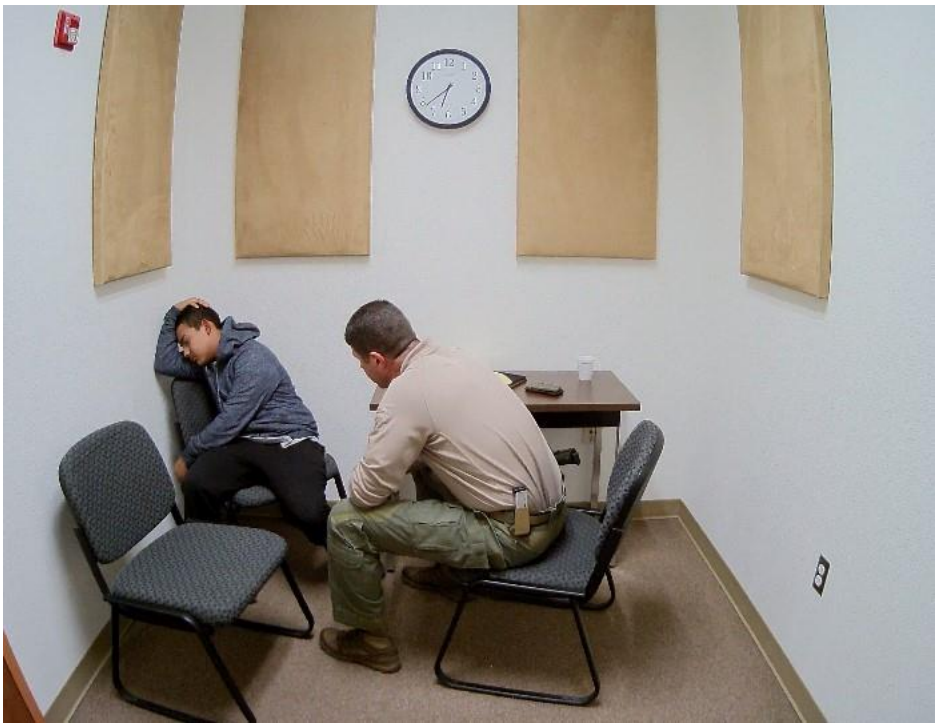
her, right?" Appellant raised his voice and said, "I didn't touch her." The Ranger repeated his question, and Appellant pulled his hoodie over his head and bent over, covering his eyes with his hands. SX 2 at 6:32. The Ranger reminded Appellant about Freudian slips, said, "look at me for a second," "come here," and put his hands on Appellant's knees.

SX 2 at 6:32. He told Appellant quietly that Appellant had already made such a slip five minutes after coming in the room and that he had the same odor on him that the Ranger smelled on the victim. He said sometimes 14-year-olds do "stupid" things and that he should make amends. *Id*. The Ranger added, "I promise you, I'll help you through it" and patted his leg. *Id*. at 6:33.

When Appellant put his head in his hands several more times, the Ranger said each time, “look at me,” and explained he was there to help but that there was evidence (DNA and stains on his pants) and that Appellant needed to let them know he was sorry. *Id*. at 6:34-35. Once when Appellant put his head down, the Ranger pulled the hoodie back. He asked Appellant about his life goals, and when Appellant said he wanted to be an actor, the Ranger said he had “plenty of time to recover from this” and be an actor but that if it was an accident or mistake, he needed to say that. *Id* at 6:36. Appellant yelled, “I didn’t f—ing touch her,” and the Ranger said quietly that he would not be able to live with himself and that it would get “worse and worse.” *Id*. at 6:36.



The Ranger said again that he knew Appellant did not mean for it to happen, and Appellant hit the empty chair next to him and positioned himself away from the Ranger, adding that he did nothing to her.



Id. at 6:38. The Ranger told Appellant he was the one person who Appellant should trust and that could help him. Appellant reacted with frustration, asking "Why do I need your help if I didn't do nothing?" The Ranger continued that it was better for Appellant to say something while the victim was telling police what happened. He told Appellant that the only way things would get better is if he took responsibility and said he was sorry. *Id*. at 6:44. Appellant continued reacting with frustration. *Id*. at 6:47. At that point, which

had been an hour, Ranger Holland offered Appellant various soft drinks and something to eat, but Appellant said he did not want anything. *Id*. He asked Appellant if he would hang out and left the room.

In the Ranger's absence, Appellant said aloud to the empty room that "of course" he and the girl smelled alike since he had carried her. *Id*. at 6:48. About 10 minutes later, the Ranger returned and said he was going to bring someone in to help Appellant and read him his rights and that if Appellant still wanted to talk to the Ranger afterwards, he could. *Id*. at 7:00. He continued to say that he would offer the assistance of a Texas Ranger, that he would not abandon Appellant. *Id*. He said Appellant could get "passed this," go to college, and "become the next Tom Cruise," which garnered a big smile from Appellant. *Id*. at 7:02. When Appellant started explaining that the smell of the cleaner on him was from carrying the girl, the Ranger stopped him, saying that he wanted the neutral person to come in first to be sure Appellant understood all his rights and that the Ranger was doing everything right. *Id*. at 7:04. He said this was not a "game ender," only a bump in the road. The Ranger talked about some of his experiences with famous people, and they shared a joke that most of them were unknown to Appellant because they

were famous to an earlier generation:

SX 2 at 7:05. He advised Appellant that he should see the world and not just stay in Texas his whole life. He told Appellant not to let the present situation stop him: "deal with it, get past it, and move on down the road." *Id*. at 7:06. The Ranger then left the room.

The hour-long break (7:07 to 8:02)

After about 10 minutes, Appellant opened the door to ask officers to get his mom something to drink but declined food, drink, and the bathroom for himself. *Id*. at 7:17. Within another 10 minutes, Appellant fell asleep leaning against the wall in the chair, *Id*. at 7:27, and eventually the lights in the room

turned off. *Id*. at 7:47. The Ranger briefly checked in on Appellant once more. *Id*. at 7:50. Appellant moved to the table and put his head down on it and slept until the magistrate came in.

Magistrate's Warnings (8:02-8:13pm)

At 8:02, the magistrate and Appellant's mother came in by themselves. The magistrate explained that he was not a part of the sheriff's department and that he was going to make sure Appellant understood his rights because, "anytime you talk to police, you need to know what you're doing." *Id*. at 8:02. He explained that Appellant had not been charged with anything and was there only as a witness but that he still had the protection of knowing his rights. *Id*. He asked Appellant and his mother to ask any questions they had. He explained that anything Appellant said to the police could be used against him later. And in response to Appellant's mother's questions about whether an appointed attorney would really represent their interests, he explained the different players in the legal system, including that prosecutors and the police were on one side and the appointed counsel working for the individual on the other side. *Id*. at 8:06. He explained that if Appellant or his mom ever were being interviewed and felt uncomfortable, they had the right to stop the

interview at any time. *Id*. Appellant nodded along, and the magistrate explained this a few more times for his mother's benefit, reiterating that a person could decide even after initially waiving their rights to stop the interview or get an attorney if they started to feel uncomfortable. *Id*. at 8:09. The magistrate asked about how school was going, and when Appellant gave an ambivalent response, encouraged him to "get his grades up." *Id*. at 8:11. The magistrate told Appellant not to be afraid, that he would not be "brow-beaten" or interrogated with "bright lights and a rubber hose"; "they just want to talk to you." *Id*. When Appellant's mother asked whether the police were supposed to have a parent in the room while they were talking to Appellant because he was a minor, the magistrate explained that they should make those wishes known to the officers. *Id*. at 8:13. The magistrate told Appellant as he was leaving, "Keep the faith; it'll work out." *Id*.

Ranger Holland asked to speak to Appellant's mother, and she left the room. *Id*. at 8:14.

Post-Magistrate Interview (8:15-8:56pm)

When Ranger Holland came back in, he removed the extra chair between Appellant and the door. *Id*. at 8:15. He asked Appellant if he had

said he'd been suspended for fighting. Appellant said he didn't want to talk about that. *Id.* at 8:16. The Ranger agreed not to ask him anything about it but told Appellant that he knew he was lying. *Id*. He reiterated that he had been "doing this" for 25 years and that everyone makes mistakes and they just needed to "get through this" and "move on down the road." *Id*.

Id. at 8:16. The Ranger said he told Appellant's mom that the worst thing Appellant could do is make a mistake and not recognize it. He told Appellant that he would end up getting Appellant's DNA through his mom's consent or

a warrant and that they would find a match. He reiterated that the victim was talking and said it would be worst-case scenario to "let this go" without admitting there was a mistake or problem and have to deal with things two or three days afterward. *Id*. at 8:18.

He then said,

> You're a juvenile. There's no reason on this deal that you shouldn't be adjudicated as a juvenile. And basically what that means is they're going to get you help. You're not going off to prison or anything horrible like that. But there's a Z on this. There's always an A to Z. And I don't want to threaten you or anything like that. But the Z is that people in the District Attorney's Office who deal with these things see that there's no remorse, in other words if you're not sorry for it, then they don't look at you like a 14-year-old kid. So, this could go bad. But it doesn't need to. And it doesn't have to, and there's no reason that it should. Quite honestly, though, and I'll be straight up with you, okay. I think you're a good person. I don't think that you're a bad person. I think you made a mistake.

The Ranger explained that he had made mistakes as a 14-year-old by skipping school and getting into fights but had made amends, gone to college, and played professional football. *Id*. at 8:20.

> But I made mistakes and I fixed that and I moved forward. That's the opportunity that's in front of you right now, the opportunity that you have today, okay? But it starts with working through this thing. I'm sitting here right now to work through it. If you're sorry, then there's no doubt what you need to do. Number 1, make amends. Let these people know you're sorry, 'cause they're the

> people sitting out there that are going to make a determination as to what happens. You're a juvenile, you need to keep it that way. You need to get down the road and get on with your life. But the other end of that is if you're not sorry. What happens, happens. I don't believe that's you. I know that's not you.

Id. at 8:20. When Ranger Holland asked Appellant again if he was sorry about what happened, that it was a mistake, Appellant closed his eyes and pulled his collar up, annoyed. *Id*. The Ranger said he trained others how to detect the signs of deception, knew he was lying about the reason for his suspension, and that Appellant was revealing the same indications of deception again. *Id*. at 8:22. He told Appellant the District Attorney would want to know whether Appellant was sorry. *Id*. He told Appellant that he was smart and would figure out that his best choice was to acknowledge his mistake because that was better than letting others think that it was not a mistake and that he wasn't sorry and thereafter try to adjudicate him as an adult. *Id*. at 8:25. He indicated to Appellant that this was the time when things could still be fixed, but if the evidence were left "hanging out there," they wouldn't be having the same conversation they were then. *Id*. He asked Appellant about times when the circumstances got worse because of a lie. *Id*. at 8:26. Appellant asked how the other people could help him, and Ranger Holland explained that he could

first be taken out of that environment, talk to a counselor, and possibly take medication. *Id*. at 8:27. Ranger Holland guessed that Appellant had urges and was thinking about them "all the time." Appellant acknowledged this was true. The Ranger asked Appellant what the consequence of it happening again was, and Appellant said he would go to jail. *Id*. at 8:28. Ranger Holland suggested they needed to do something to help Appellant to make sure he didn't hurt anyone. *Id*. at 8:28. When Appellant had his hands to his face again, Ranger Holland said, "You're not a bad person." Appellant put his head on the table and said, "I feel like I am." The Ranger told him that it sounded like he needed help but that he couldn't keep acting that way, that "it's not okay." *Id*. Appellant was audibly crying on the table behind Ranger Holland. *Id*. at 8:28.

He told Appellant that he needed to get help to fight the urges because if he was 19 and it happened again, it would be a "game ender." *Id.* at 8:29. He told Appellant that they needed to get him counseling and rhetorically added, "Who's next if we don't?" *Id*. He reassured Appellant that he was 14 and made a mistake but that right now he didn't have to pay for it for the rest of his life. *Id*. at 8:29. He told Appellant that he had to reach out for help because he did not want to ever do that again, and Appellant agreed. *Id*. at 8:30. The Ranger asked if he wanted help so it would never happen again, and Appellant said, "Yes." *Id*. at 8:30. Appellant then agreed for the first time that he was sorry. *Id*. He said, "I feel like a monster," and started crying hard, leaning on the

table. Ranger Holland told him, "I don't want to see this happen to anyone else" and that he knew Appellant felt the same. *Id*. at 8:31. The Ranger told Appellant that he was going to help him, and Appellant agreed that he trusted that. *Id*. at 8:33. The Ranger left to get some tissues. On his return, he reaffirmed with Appellant that he had made a mistake, that they would get him counseling, and that this wasn't the end of his life but a "bump in the road." *Id*. at 8:34. He asked Appellant what happened.

Appellant explained that he carried the little girl out of her room to where he used to live, had sex with her in the bedroom, tried to clean her up, knocked her unconscious, and moved her under the trailer after she was asleep. *Id*. at 8:35 to 8:41. Appellant continued crying, and Ranger Holland told him he was not a bad person, explaining that if he had walked out of the room without admitting his mistake and asking for forgiveness, he would have "defined himself as a bad person." *Id*. at 8:46. He told Appellant that he was a good person because he could not live with himself. *Id*. Appellant said he did not ejaculate because he already "felt like a monster" as he was assaulting the victim. *Id*. at 8:50. The Ranger told Appellant that the only way he could heal and lift the weight off his shoulders was to recognize that he

had a problem. *Id*. at 8:52. At the Ranger's prompting, Appellant said that if he could go back and do it again, he would not have taken her. *Id*. at 8:55.

Appellant declined the Ranger's offer of soft drinks, food, and talking with his mom, but he went with the Ranger to wash off his face. *Id*. at 8:55, 8:59. When Appellant returned to the room by himself, after a few minutes, he sat down on the floor underneath the table and pulled the bottom of the chair toward him like a barrier. *Id*. at 9:03. When the Ranger came back in a few minutes later with pizza, Appellant explained that he was sitting there because he didn't want to hurt anybody. *Id*. at 9:09. The Ranger left the room to let him have his space, and other than Appellant stretching out further on the floor and the Ranger checking in on him, nothing more happened. *Id*. at 9:09-9:30.

Suppression Hearing

Appellant moved to suppress his oral statements on the basis that (1) the pre-warning interview was custodial, requiring the Family Code warnings under § 51.095; (2) the magistrate's ad-lib explanations varied from the statutorily required warnings, undermining the voluntariness of the post-warning statement; and (3) both statements were involuntary because, in

exchange for his confession, the Ranger promised help generally and that he shouldn't be adjudicated. 54CR at 205-207 (App. Trial Brief). At the hearing, Appellant additionally argued that the statements were involuntary under a totality of the circumstances. 3 RR 90-91 (hearing). After hearing testimony from the magistrate and Ranger Holland and viewing the interview, the trial court denied Appellant's motion. 54CR at 231. Appellant nonetheless received jury instructions on compliance with warnings under § 38.22, § 7, and a § 6 general voluntariness instruction, requiring the jury to disregard his confession if they did not find his statement was "freely and voluntarily made without compulsion or persuasion." 54CR at 233. Appellant spent about a third of his closing argument arguing that the jury should disregard it. 8 RR 22-32 (statement); 8 RR 22-50 (entire argument).

Court of Appeals

Appellant re-urged his suppression complaints on appeal—that warnings were required at the start of the interview and that the magistrate's explanations and Ranger's promises rendered his statement involuntary.[4]

[4] Appellant also argued that evidence derived from the statements should be excluded because of actual coercion, but this wasn't expressly argued at trial.

App. COA Brief at 26. Regarding the promises, the court of appeals cited the multi-prong test in *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1994), that a promise may render a confession involuntary if it was positive, made or sanctioned by someone in authority, of some benefit to the defendant, and of such character as would likely cause a person to speak untruthfully. *Ochoa v. State*, 675 S.W.3d 793, 810 (Tex. App.—Fort Worth 2023). It held that the analysis "ends at the first element because [Ranger] Holland did not make an unqualified promise to [Appellant]" and relied on caselaw requiring an unequivocal promise. *Id*. It noted that the Ranger told Appellant that he did not make the decision whether to treat him as a juvenile, that a prediction about future events is not the same as a promise, and general, nonspecific offers to help are unlikely to elicit a false statement. *Id*. at 811. Although the court had "concerns" about telling Appellant there was no reason why he could not be adjudicated as a juvenile, the Ranger's statements were not a positive promise. *Id*.

SUMMARY OF THE ARGUMENT

The Ranger's suggestion to Appellant that he would most likely be adjudicated as a juvenile did not meet the test for being a positive promise

inducing his confession. It was not a *quid pro quo* offered in exchange for confessing, was equivocal, did not induce Appellant's confession, and would not have offered such a one-sided benefit that it was likely to cause someone innocent to falsely confess. This standard should apply to juveniles because it is a limited claim of narrow application anyhow. It applies only when there is a stand-alone claim that a law enforcement promise has induced a confession. Other totality-of-the-circumstances voluntariness claims (both state and federal) are available and better able to be tailored to the needs and circumstances of juveniles. Finally, Appellant's confession was not rendered involuntary under the federal due process clause given the relatively short length of the interview, the number of warnings Appellant received, his exercise of rights when he wanted to, the intervention by a magistrate, and that what prompted his confession had nothing to do with implied promises about juvenile adjudication.

ARGUMENT

Issue 1

Telling Appellant that there was no reason why he shouldn't be adjudicated as a juvenile was not a positive promise inducing Appellant's confession.

Issue 2

The positive promise standard is a feature of state law that applies whenever a confession is challenged as involuntary solely due to an alleged promise made by law enforcement. It applies to defendants tried in adult court who gave statements to police as juveniles.

1. The positive promise standard is a state-law limitation on when a promise alone renders a confession inadmissible.

By statute, a defendant's statement is admissible only when it is "freely and voluntarily made without compulsion or persuasion…." TEX. CODE CRIM. PROC. art. 38.21. This language is broad. It suggests that any official advice that a defendant would be better off if he confessed might qualify as persuasion requiring suppression.[5] WHARTON'S CRIM. EVID. § 651 at 520 (8th ed.). But this Court, as a matter of state law, has consistently limited the

[5] *See also Bram v. United States*, 168 U.S. 532, 542-43 (1897) (stating but not applying quotation that "a confession…must not be…obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence"); *see Henderson*, 962 SW2d at 566 (Tex. Crim. App. 1997) (rejecting that *Bram* sets the standard for admissibility of confessions under Texas law).

application of the exclusionary sanction from law enforcement promises alone to positive promises, made or sanctioned by a person in authority, that would make a defendant believe his condition would be bettered by making a confession, true or false.[6] *Thompson v. State*, 19 Tex. App. 593, 616 (Tex. App. 1885); *Fisher v. State*, 379 S.W.2d 900, 902 (Tex. Crim. App. 1964); *Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App. 2004). The rationale for excluding such statements is that they are inherently unreliable. *Freeman v. State*, 723 S.W.2d 727, 730 (Tex. Crim. App. 1986); *see also In re Gault*, 387 U.S. 1, 45 (1967), *abrogated on other grounds by Allen v. Illinois*, 478 U.S. 364, 372 (1986) (discussing danger of false confession where an "innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.").

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[6] This last element is sometimes expressed as being "of such a character as would be likely to influence the defendant to speak untruthfully." *Garcia*, 919 S.W.2d at 388. This is different than requiring a showing that the confession be false, which is not a part of a voluntariness determination. *Martinez*, 127 S.W.3d at 795; *Lego v. Twomey*, 404 U.S. 477, 482 (1972).

Importantly, though, the absence of any of the factors in the positive promise standard does not preclude a finding of involuntariness. The federal due process voluntariness standard employs a totality of the circumstances test, which would consider any relevant facts together.[7] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *see also People v. Stewart*, 999 N.W.2d 717, 721 (Mich. 2023)(express or implied assurances may render a statement involuntary but promises of leniency are "only one factor to be considered within the totality-of-the-circumstances analysis."); *Martin v. State*, 107 So.3d 281, 314 (Fla. 2012) (explaining that its state cases requiring express *quid pro quo* bargains for a confession did not trump federal due process voluntariness determined under a totality of the evidence). Under the due process clause, "certain interrogation techniques, either in isolation or as

[7] The court of appeals said it was construing Appellant's claim as a federal due process voluntariness claim but then went on to apply the *Garcia* positive promise standard and purported to end its analysis on the failure to meet the first element. *Ochoa*, 675 S.W.3d at 810. This was wrong. Nevertheless, Appellant appeared to make a stand-alone claim that his confession was induced by a law enforcement promise (where *Garcia*'s test is applicable) and a totality-of-the-circumstances voluntariness claim, which the court of appeals rejected in his issue involving evidence derived from his statements. *Id*. at 812.

applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). And a defendant can also raise a general state law voluntariness claim under TEX. CODE CRIM. PROC. arts. 38.21 and 38.22 that does not require police overreaching and can consider "sweeping inquiries into the state of mind of a criminal defendant." *Oursbourn v. State*, 259 S.W.3d 159, 172-73 (Tex. Crim. App. 2008) (distinguishing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), which requires coercive police activity as a necessary predicate to due process involuntary confession claim). Appellant raised no separately articulated state-of-mind claim under *Oursbourn*.

Despite the availability of these other ways to challenge a confession, *Garcia*'s positive promise standard still has a role to play where, as here, a defendant asserts that a promise alone has rendered his confession inadmissible.

2. A positive promise requires a clearly expressed offer to exchange a benefit for making a statement.

The "promise" requirement of a positive promise requires a *quid pro quo* of benefit offered or exchanged for the confession. *Chambers v. State*, 866 S.W.2d 9, 20 (Tex. Crim. App. 1993). One example includes:

- "[I]f [you] would tell all about [the offense] so that [I, the sheriff] could get all the guilty parties, [I] would do what [I] could for [you] in [your] case.[8] *Searcy v. State*, 13 S.W. 782 (Tex. App. 1890).

Some examples that do *not* qualify include:

- Stating that leniency was sometimes shown when a defendant confessed. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (distinguishing a promise from a statement of fact);

- Telling the defendant that if he were to tell his account to the sheriff and grand jury "he might come clear" or "may be he would not be prosecuted." *Thompson*, 19 Tex. App. at 616 (distinguishing promise from mere opinion or prediction "as to what might be the result of such action.");

- Conveying to the defendant that the crime he was accused of did not qualify for the death penalty under Texas law. *Freeman*, 723 S.W.2d at 730 (the promise must extend something that the defendant does not already have).

- Telling the defendant that, if he wasn't the one who pulled the trigger, there was a possibility he wouldn't be charged with capital murder. *Garcia*, 919 S.W.2d at 388.

The "positive" requirement usually has meant "unequivocal and definite." *Sossamon v. State*, 816 S.W.2d 340, 345 (Tex. Crim. App. 1991), *abrogated on other grounds by Graham v. State*, 994 S.W.2d 651 (Tex. Crim.

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[8] The Court doesn't elaborate on how this offer to do "what [he] could" in exchange for the defendant's statement is sufficiently positive or definite, and the case likely would have been decided differently today.

App. 1999) (citing *Washington v. State*, 582 S.W.2d 122, 124 (Tex. Crim. App. 1979)); *but see Janecka v. State*, 937 S.W.2d 456, 466 (Tex. Crim. App. 1996) ("promises must be positive, i.e., of some benefit to the declarant"). "Positive" is commonly defined as "expressed clearly or peremptorily." *See* merriam-webster.com/dictionary/positive. It typically includes express statements but, provided they were clear, might also include implicit ones. *See Chambers*, 866 S.W.2d at 21 (finding police cliché that "everything would be alright" did not induce defendant's confession either explicitly or implicitly); *Henderson v. State*, 962 S.W.2d 544, 564 (Tex. Crim. App. 1997) (officer's questions and deflections of defendant's suggestion to tell police everything in exchange for being allowed to stay in Missouri was not even an implied promise and "ambiguous at best"). Similarly, in *Garcia*, promises to "talk to the D.A." or to "do whatever I could to help him out" if the defendant told police about the crime were held not to be "specific promises." 919 S.W.2d at 388.

3. The test also requires the promise be made by someone in authority or perceived to be so and likely to induce even false confessions.

To (alone) render a confession involuntary, any promise must have been made or authorized by someone with the apparent power to fulfill the promise. *Garcia*, 919 S.W.2d at 388. Presumably this requirement is necessary

because a defendant could not reasonably rely on a promise given by someone without such apparent power. When the officer clearly informs the defendant that he did not have the authority to make agreements or deals, the officer's statements cannot constitute an improper promise. *Henderson*, 962 S.W.2d at 565.

A promise has the likelihood of inducing a false confession when a confession makes the defendant no worse off than the status quo and potentially better off. *Sossamon*, 816 S.W.2d at 345. In *Sossamon*, for instance, the defendant was offered immunity for prosecution in exchange for information on the crimes in which he was involved. Such a promise offered no downside regardless of whether his confession was truthful and so was involuntary. *Id*. And in *Washington*, the defendant agreed to provide a stipulation to his guilt in exchange for the State's promise to agree to a motion for new trial to set aside his guilty plea if he passed a polygraph exam. 582 S.W.2d at 124. The Court reasoned that a person intending to tell the truth on the polygraph (and thus passing it) would have nothing to lose by confessing but have the possibility of having the charges dismissed. *Id*. By contrast, a promise to contact charitable authorities isn't something that

would likely influence a person to falsely confess since many people shared the same ability to contact the same authorities. *Muniz*, 851 S.W.2d at 254.

4. The Ranger's statement about adjudication as a juvenile was not a positive promise.

The court of appeals was correct that Ranger Holland's statements about being adjudicated as a juvenile and his not going to prison did not qualify as a positive promise sufficient alone to render his confession inadmissible. It was Holland's opinion or prediction of future events that he told Appellant was determined by other people. And these predictions were not contingent on Appellant doing anything at all. The Ranger built up his experience in crime solving and status as an elite law enforcement officer flying in from out of town, but that would have suggested no ability to predict, much less control, what local authorities would do. Not only did he repeatedly say the decision was in the hands of the prosecutors, he referred to no one by name but only by a general reference to "other people" or "the people in the District Attorney's Office."[9] He thus implied no relationship that could give him influence over their decisions. And instead of suggesting his expertise or

[9] Appellant seemed to appreciate that it was in the hands of others, too, as he asked the Ranger, "how are they going to help me?" SX 2 at 8:26.

experience was in working cases involving juveniles, he gave the impression that his cases were primarily adults—the Ted Bundy's and other worst-of-the-worst serial killers.

While the Ranger clearly conveyed his belief that remorse would have a net positive effect on those deciding whether to handle Appellant's case under the juvenile justice system and that there was limited time to take advantage of that leniency, this was not a definitive or specific offer of what would happen if he confessed. There was no *quid pro quo*. Nor did these statements appear to have been the impetus for the confession. There was about fifteen minutes between the Ranger's statements about juvenile adjudication (8:18) and when he began telling the Ranger what happened (8:34).[10] This suggests it was not the inducement of his confession—the concern over it happening again and hurting someone else was. Even if the Ranger's adjudication statement lingered in Appellant's mind, it did not rise to the level of presenting confession as having no downside.

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[10] Appellant's admission that he didn't ever want it to happen again and that he was sorry occurred after 12 minutes at 8:30.

5. The positive promise standard applies to statements made as a juvenile.

Admissibility of a juvenile's statements is generally controlled by the Family Code, not Art. 38.22. *Vega v. State*, 84 S.W.3d 613, 616 (Tex. Crim. App. 2002) (citing *Griffin v. State*, 765 S.W.2d 422, 427 (Tex. Crim. App. 1989)). There is an argument that the statutory requirements of warnings, intervention by a magistrate and even a finding of voluntariness by the magistrate[11] have eclipsed any need for state law analysis based on when promises might induce a confession. Nonetheless, it would be an odd that adults would have the option of making a free-standing improper promise claim (with its accompanying positive promise standard) and juveniles prosecuted in the adult system would not. *See Application of Gault*, 387 U.S. at 45. Furthermore, there is no reason to allow the claim without its necessary limitation—the positive promise standard. The existence of other, better protections against involuntariness (*Miranda*, statutory warnings, requirements to record oral statements, jury submission of the voluntariness question) and the availability of other involuntariness claims should provide

[11] *See* TEX. FAM. CODE § 51.095; *State v. Torres*, 666 S.W.3d 735, 736 (Tex. Crim. App. 2023). There is no indication the magistrate invoked the procedures of § 51.095(f) here.

adequate protection against overreach and for juveniles in need of protection from themselves.[12] The state and federal general voluntariness standards already take a juvenile's age into account,[13] as does the trigger of custody for *Miranda* warnings. *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011). While the Supreme Court has long acknowledged a juvenile's vulnerability during police interrogation,[14] there is no reason to think that the requirements of a positive promise need be especially sensitive to a juvenile's situation. Their smaller vocabulary, lack of life experience, and inability to pick up on subtleties that adults are aware of, in fact, counsel against eliminating a requirement of a definite *quid pro quo*.

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[12] *Oursbourn*, 259 S.W.3d at 172.

[13] *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (totality-of-the-circumstances approach is adequate to determine, given a juvenile's circumstances, whether a waiver under *Miranda* is valid).

[14] *See, e.g., Haley v. State of Ohio*, 332 U.S. 596, 599-600 (1948) (plurality) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

Issue 3

Appellant's statement was voluntary under a totality of the circumstances.

To prevail on a due-process "involuntary confession" claim, a defendant must show (1) that police engaged in activity that was objectively coercive, (2) that the statement is causally related to the coercive government misconduct, and (3) that the coercion overbore the defendant's will. *Lopez v. State*, 610 S.W.3d 487, 494 (Tex. Crim. App. 2020). Factors to consider are "the youth of the accused, his lack of education or his low intelligence, the lack of any advice about constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." *Schneckloth*, 412 U.S. at 226 (citations omitted).

Most of these factors indicate nothing but that Appellant was in a free and voluntary situation. Appellant and his mother appear to have voluntarily gone to the police station. 3 RR 91 (prosecutor filling-in background for judge). He was not in handcuffs, his mother consented to his being interviewed, and the door to the interview room was unlocked. To the extent his youth put him at a disadvantage in knowing about his rights, this was

overcome by two different sets of warnings. The Ranger carefully explained that he was not under arrest, was free to leave, did not have to talk to the Ranger, and could go talk to his mother any time. Appellant affirmatively said he understood and exercised some of that freedom by opening the door and asking that his mother be given something to drink. Before any incriminating statements, a magistrate carefully explained his rights in his mother's presence, including the right to stop the interview, the importance of knowing what you're doing anytime you talk with police, and that he and his mother could ask for her to be present. Appellant again demonstrated he could invoke his rights when he wanted by telling the Ranger he did not want to talk about his school suspension. These warnings were important. As the Supreme Court has recognized, "one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)).

While young people have a shorter attention span and are more susceptible to outside pressure, there were other factors to counteract that. The interview was relatively short—an hour and 20 minutes, an hour-long

break (spent mostly sleeping) followed by another 41 minutes. And Appellant was offered multiple opportunities for food, drink, and the bathroom, but declined.

The magistrate's explanations that he was there as a witness, not as someone charged with a crime, could not have misled Appellant in his decision whether to say what happened. Appellant was frustrated in the interview because the Ranger kept insisting that Appellant was responsible (although only mistakenly). And the other warnings about Appellant's ability to stop the interview at any time would have lessened any harm from the magistrate indicating to Appellant's mother that counsel was primarily for court. At any rate, Appellant indicated he understood what the magistrate read to him from the statutory warnings, even if his mother did not. His isolation from his mother did not appear to be a factor given that he never asked that she be present, even when he was expressly told that she could be there and was offered the opportunity to speak with her.

Appellant's capacity for self-determination, even potentially impaired by his youth, was not critically impaired by law enforcement tactics. *See Schneckloth*, 412 U.S. at 225-26 (only offends due process if a person's "will

has been overborne and his capacity for self-determination critically impaired"). The Ranger repeatedly urged him to say he was sorry, explaining that he could overcome his mistake by taking responsibility and making amends. But this was not inherently coercive, even for a 14-year-old. Regardless of what impact the Ranger's prediction might ordinarily have on someone rationally weighing whether to confess, Appellant was expressly told that the Ranger did not make those decisions. Moreover, indirect or implicit promises have only a fraction of the "potency" of direct promises and weigh less heavily in a voluntariness calculation. *See Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir. 1988); *Miller v. Fenton*, 796 F.2d 598, 610 (3d Cir. 1986).

It is important to note that, at the time of the conversation, the only one who could have known the full extent of what happened to the victim was the person who did it. There is no indication the Ranger knew she had been knocked unconscious, strangled, or even necessarily sexually assaulted. As a result, the Ranger was not being deceptive when he suggested that Appellant's confession would be a "bump in the road" and not forever derail

his life plans. The defense may have recognized this too, as they did not claim at the suppression stage that his confession was induced by deception.

Also, the Ranger's lack of information greatly reduces the risk of a false confession. False confessions, while not the primary target of the right against self-incrimination, are as concerning if not more so, and this danger is especially acute with those more easily swayed, as juveniles can be. *See J.D.B.*, 564 U.S. at 269. But this is not a case in which the interrogator fed details to a juvenile and demanded he admit he did it. By all indications, the Ranger learned what happened from Appellant.

Combining all this with the Ranger's generic appeal to Appellant to unburden himself and seek help for unelaborated-upon urges, it seems highly doubtful that manipulation of Appellant is what produced his detailed admission. None of it seemed to be motivating Appellant either to keep talking or to abandon his claims of innocence. Initially, he wanted the Ranger to believe he was innocent. He was eager to talk and tried to explain the cleaning solution even when the Ranger asked him to pause. What started changing things for Appellant was when the Ranger talked about the prospect of this happening again if he did not do something to address it. His own guilt

and fear of reoffending were the critical point for admitting his guilt, not any promises of a specific charging decision.

In another context, the Ranger's statements about being adjudicated as a juvenile and staying out of prison might be the critical point, particularly for a teenager who testified to that fact and perhaps an expert who could explain it. But not in this case.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals affirm the court of appeals and Appellant's convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 7,738 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of March 2023, the State's Brief on the Merits was served electronically on the parties below.

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