NO. 0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	290TH JUDICIAL DISTRICT
JO SMITH	)	BEXAR COUNTY, TEXAS

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS WRITTEN OR ORAL STATEMENTS OF DEFENDANT

TO THE HONORABLE MELISA SKINNER, JUDGE OF THE 290TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS:

Jo Smith was interrogated and made an electronically recorded statement to law enforcement on March 27, 2018. Ms. Smith filed a Motion To Suppress Written Or Oral Statements Of Defendant and this Court held an evidentiary hearing on June 17, 2018. This memorandum is filed in support of that motion and contains references to the hearing, and to the electronic recording of Ms. Smith's interrogation and statement.[1]

I. Summary of Argument

There are two reasons to suppress the recorded statement that Ms. Smith made to San Antonio arson investigators William Summers and Anthony Guerrero on March 27, 2018. First, Ms. Smith was in custody and was therefore entitled to the so-called *Miranda* warning, and, because she was not warned, the statement is inadmissible. Second, her

[1] The record from the hearing will be cited to in this way: [H.___]. Ms. Smith's electronically recorded statement will be referenced by time-marks, in this way: [DVD.___–___]

statement was improperly induced by promises the investigators made to her, and is therefore involuntary and inadmissible.

1. The statement is inadmissible because Ms. Smith was in custody but was not given the warnings required by *Miranda* and article 38.22.

Two things are undisputed here: law enforcement interrogated Jo Smith and they did not give her the warnings set out in *Miranda v. Arizona*, and article 38.22, § 3 of the Texas Code of Criminal Procedure. The only issue in this case is whether Ms. Smith was in "custody" when the investigators interrogated her. When the totality of circumstances are considered – the recorded interrogation itself and the testimony of investigator Summers – there is no doubt that the interrogation was custodial. These trained, experienced investigators knew they needed an admission of guilt, they focused on Ms. Smith and summoned her to the Arson Bureau, and to maximize their opportunity for obtaining the admission, they deployed a variety of well-established interrogation techniques and deliberately created a coercive atmosphere that would have caused any reasonable person to believe that she was in custody. Specifically:

- Before Ms. Smith was summoned to the Arson Bureau, she knew that the investigators had gone to her place of employment and photographed her car, that they had interrogated and polygraphed her friend, Bryan Ant, and that they had been given her name by a friend of Ant whose home had been burned;
- When Ms. Smith arrived at the Arson Bureau she was placed in a small, closed interview room where she was separately interrogated for the next two and a half hours by two arson investigators;
- Ms. Smith was not advised, before the interrogation began, that she was free to leave, or that she was not then under arrest. She was not so advised until after she

had incriminated herself;

- Although investigator Summers did not *Mirandize* Ms. Smith or timely advise her that she was free to leave and was not then under arrest, he did tell her that he was conducting an "official interview" that was required and authorized by law, and that he could prosecute her for aggravated perjury if she lied to him or omitted any facts;

- Ms. Smith asked investigator Summers two times if she needed or should get a lawyer, and each time he carefully either avoided her question altogether, or gave her misleading information, and continued interrogating her;

- Summers repeatedly employed a well-known interrogation technique that is designed to elicit confessions, confidently positing Ms. Smith's guilt, and claiming to only be interested in why the offense was committed;

- Summers used another established technique, assuring Ms. Smith that, although he knew she had committed the crime, he believed that she had a reduced degree of moral blameworthiness. Specifically, he told her that he believed she was a sweet, loving, caring person, that he regarded her as a "victim" of Bryan Ant, that he was convinced that Ms. Smith's emotions got the best of her for a split second, and that the extensive damage caused by the fire was largely the result of windy conditions that were not her fault.

Jo Smith's electronically recorded statement to investigators Summers and Guerrero on March 27, 2018, introduced at the evidentiary hearing as state's exhibits one and two,[2] was the product of custodial interrogation, but was not preceded by the warnings required by *Miranda v. Arizona*[3] and by article 38.22, § 3, and by the cases that have followed and interpreted *Miranda* and its Texas statutory counterpart. The calculated efforts of these experienced law enforcement officers violated the Fifth and Fourteenth

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[2] [H-23-26]

[3] 384 U.S. 436 (1966).

Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and article 38.22, § 3(a)(2) of the Texas Code of Criminal Procedure.

2. The statement is inadmissible because it was not freely and voluntarily made without compulsion and persuasion.

When the totality of circumstances are considered there is no question that Ms. Smith was in custody and that her unwarned statement is inadmissible for that reason alone. There is an additional reason that the statement is inadmissible: it was not freely and voluntarily made, without compulsion or persuasion, and the suppression of an involuntary statement is required regardless of whether the suspect was in custody.

As pointed out previously, the two trained and experienced arson investigators in this case repeatedly told Ms. Smith that they knew she started the fire in question, and that the only remaining question was her intent. The investigators posed alternate hypotheses. Under the first hypothesis, Ms. Smith was a nice and good person, indeed, a victim herself, who started a fire that had unfortunately escalated into a large and massively destructive fire because of unusual wind and weather conditions, and that she had no intent to hurt any one. Under the second hypothesis, Ms. Smith was a "monster," who started the fire intending to kill many people. In the first case, Ms. Smith was guilty of a property crime, merely arson; in the second case, she was guilty of attempted capital murder, which, according to Summers, was a much more serious crime. Ms. Smith's only hope, according to the investigators, was to confess to them that she had committed the lesser crime only, and to explain her unintentional motives, and if she did this, they would report to the

prosecutors and the judge, who understood crimes of passion. If she confessed, the investigators told her, she had reason to hope for a lenient sentence, even probation. This, though, according to the investigators, would be her last chance to tell her story.

The statement was involuntary, in violation of Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and article 38.21 of the Texas Code of Criminal Procedure, because it was induced and coerced by persons in authority who positively promised benefits, and these promises were of such a character that they would be likely to influence a defendant to speak untruthfully.

II.
Ms. Smith Was Not *Mirandized*, And Because She Was In Custody, Her Statements Must Be Suppressed

1. The warnings that are required by State and Federal law were not given here.

The purpose of the *Miranda* decision was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[4] There the Court mandated the following "procedural safeguards," – or ones equally effective – before the prosecution can use a statement made by the accused:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.[5]

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[4] 384 U.S. at 442.

[5] 384 U.S. at 479.

The *Miranda* warnings are "virtually identical" to those also required by article 38.22 §§ 2 & 3 of the Texas Code of Criminal Procedure.[6]

It is undisputed that Ms. Smith was not given the warnings required by *Miranda* or article 38.22, § 3(a)(2). Those warnings are nowhere heard on the recording, and investigator Summers admitted they were never given.[7] Summers also acknowledged what the recording makes plain: the statements he obtained from Ms. Smith were the product of his interrogation.[8] And Summers admitted he was acting in a law enforcement capacity when he interviewed Ms. Smith, and that he identified himself to her as such.[9]

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[6] *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). TEX. CODE CRIM. PROC. art. 38.22 § 3(a)(2) says that no oral statement stemming from custodial interrogation will generally be admissible unless, among other things, the accused was given the warnings enumerated in article 38.22 §2(a), which are as follows:

> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
>
> (5) he has the right to terminate the interview at any time.

[7] [H.39-40]

[8] [H.40]

[9] [H.43]

The only remaining question in this case is whether Ms. Smith was in custody. It is clear that she was.

2. The definition of "custody."

"[I]t is not necessary that an accused be under formal arrest for *Miranda* rights to arise. 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way*.'"[10]

In *Dowthitt v. State*, the court of criminal appeals "outlined at least four general situations which may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave."[11] In the fourth situation, the officer's probable cause belief must be "manifested to the suspect."[12]

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[10] *Ruth v. State*, 645 S.W.2d 432, 435 (Tex. Crim. App. 1979)(emphasis in original)(citing *Miranda v. Arizona*, 384 U.S. at 444); *accord*, *Melton v. State*, 790 S.W.2d 322, 325 (Tex. Crim. App. 1990)("A person need not be under formal arrest in order to be in custody."); *See generally Miranda v. Arizona*, 384 U.S. at 444.

[11] 931 S.W. 2d 244, 255 (Tex. Crim. App. 1996).

[12] *Id*. at 255; *See also Stansbury v. California*, 511 U.S. 318, 325 (1994)("An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned.").

In *State v. Ortiz*, the Texas Court of Criminal Appeals noted that the custody determination must be made on a case-by-case basis by looking at the totality of circumstances.[13] *Ortiz* expressly recognized that the four custody situations enumerated in *Dowthitt* are "merely descriptive, not exhaustive."[14] When determining if a suspect is in custody "the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement 'comparable to . . . formal arrest,' given all the objective circumstances."[15] This, in turn, requires that the courts look "only to the objective factors surrounding the detention," unless "the officer manifests his belief to the detainee that he is a suspect." Then the "officer's subjective belief becomes relevant to the determination of whether a reasonable person in the detainee's position would believe he is in custody."[16]

3. The totality of circumstances show that Ms. Smith was in custody.

We will rely on a number of state and federal cases, including *Dowthitt* and *Ortiz*, to show that Ms. Smith was in custody when she was interrogated on March 27, 2018. Specifically, from *Dowthitt*, it is unquestionable that the investigators conveyed to Ms. Smith their beliefs they had probable cause to arrest her and that they did not tell her she

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[13] 382 S.W. 3d 367, 372 (Tex. Crim. App. 2018).

[14] *Id*. at 376.

[15] *Id*. at 372.

[16] *Id*. at 372-374.

was free to go at any time before she incriminated herself. Under *Ortiz*, "the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement 'comparable to . . . formal arrest,' given all the objective circumstances." Again, it unquestionable that a reasonable person under the circumstances that confronted Ms. Smith could have drawn no other conclusion.

a. Assuming the encounter began as consensual, it escalated into custodial before Ms. Smith incriminated herself.

Investigator Summers testified that he first heard of Ms. Smith from Susan Atkins on March 1, 2018, at which time he considered her a "person of interest."[17] Ms. Smith was aware that Ms. Atkins had given her name to investigator Summers.[18] Sometime later, but before he met with Ms. Smith, Mr. Summers went to her place of employment and took photographs of her car, and Ms. Smith knew about this before she was interviewed.[19] Later still, on March 22, Summers spoke to Bryan Ant.[20] According to investigator Summers, he knew Mr. Ant and Ms. Smith had talked after Ant's interview, and that Ant had told her he had been treated a little roughly.[21] Summers admitted that, after speaking to Mr. Ant, he had probably made up his mind that Ms. Smith had set the

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[17] [H.32-33]

[18] [DVD.11:44:00]

[19] [H.33-34]; [DVD.10:25:56]

[20] [H.34]

[21] [H.22]

fire. Summers told Ms. Smith he "did want to speak to her," and he made an appointment for her to come to his office for that purpose.[22] At some time before their meeting, Mr. Summers "ran" Ms. Smith's license plate, "to get information on her that would help [him] with [his] investigation."[23]

Not surprisingly, investigator Summers claimed at the hearing that Ms. Smith was not "under arrest" when he took her statement.[24] Self-serving testimony like this is of no use to the prosecution "when belied by the facts of the case."[25] Assuming that the encounter on March 27, 2018 began as consensual, and that she was not formally arrested or booked then, and that she was allowed to leave after the interrogation concluded, that does not mean that Ms. Smith was not in custody for purposes of *Miranda* when she incriminated herself. Instead, "[w]hat had begun as a consensual inquiry . . . appears to have escalated into full police interrogation in which the police sought to extract a confession."[26]

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[22] [H.38]

[23] [H.35]

[24] [H.39]

[25] *Ruth v. State*, 645 S.W.2d 432, 435 (Tex. Crim. App. 1979).

[26] *Ussery v. State*, 651 S.W.2d 767, 770 (Tex .Crim. App. 1983); *see also Dowthitt v. State*, 931 S.W.2d at 255 (noting "the mere fact that an interrogation begins as non-custodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation"); *see also State v. Ortiz*, 382 S.W.3d 367 (Tex. Crim. App. 2018)("routine traffic stop escalated into a custodial detention because the objective circumstances would have

b. Investigator Summers expressly accused Ms. Smith, over and over again, of having started the fire, and accusations like that would make any reasonable person believe she was in custody.

In *State v. Ortiz*,[27] as in Ms. Smith's case, the only *Miranda* question was whether the defendant was in custody at the time the incriminating statements were made. The court of criminal appeals agreed with the trial court and affirmed its suppression order, finding that a reasonable person in Ortiz's "position would have believed, given the accretion of objective circumstances, that he was in custody."[28] One of the most significant factors in the court's determination that Ortiz was in custody was that the arresting officer "unmistakably communicated" his suspicion and "expressly accused" Ortiz of possessing cocaine. The officer's

> overt attitude concerning the appellee's likely complicity, because it would have been readily apparent to the appellee, constituted "one among many factors that bear upon the assessment of whether [the appellee] was in custody." It *provides substantial support* for the court of appeals's conclusion that a reasonable person in the appellee's position would have believed he was in custody by the time he made the cocaine statements.[29]

The same is true in Ms. Smith's case. Here, as in *Ortiz*, investigator Summers

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caused a reasonable person to perceive that the detention was restraint on his movement comparable to a formal arrest).

[27] 382 S.W. 3d 367 (Tex. Crim. App. 2018).

[28] *Id*. at 373.

[29] *Id*. at 374 (emphasis supplied). *See also Xu v. State*, 100 S.W. 3d 408, 414 (Tex. App.–San Antonio 2002, pet. ref'd)("The cumulative effect of these statements would certainly convey to a reasonable person that the investigation had now focused on him. It would also affect his perception of whether he was free to leave.").

"unmistakably communicated" and "expressly accused" Ms. Smith, over and over again, of having intentionally started the fire. In fact, Summers's accusations against Ms. Smith were more emphatic and personally directed than those made against Ortiz, and were more numerous.[30] For example:

> Summers: The, the thing I need from you though, and I'm *totally convinced* that you're responsible for this fire.[31]
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> * * *
>
> Smith: Do you understand that I didn't do it?
>
> Summers: I understand that *you did do it*, based on the information that I have. You, you, this is so, this is so easy for me to put together. This was easy for me to put together. It wasn't nothing hard. You know. This is a simple thing, you know.[32]
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> * * *
>
> Summers: You know, I, *I'm convinced you did*. *I have no doubt in my mind you did*.[33]
>
> * * *
>
> Smith: You think a hundred percent that I did this?

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[30] In *Ortiz*, the officer asked three questions of Mr. Ortiz, none of which directly and necessarily implicated Ortiz himself, as opposed to his wife. The officer's first question was, "How much drugs are in the car?" The second question was, "What kind of drugs does your wife have?" The third was, "What kind of drugs . . .? *State v. Ortiz*, 382 S.W. 3d at 370.

[31] [DVD.11:36:44 – 11:36:47][emphasis supplied]

[32] [DVD.11:33:28 – 11:33:49][emphasis supplied]

[33] [DVD.11:40:12][emphasis supplied]

Summers: *Hundred percent. Hundred percent*, Jo. I've talked to everybody else in that building. They're all older people for the most part. Summer was just staying with her grandmother. Its, uh, nobody was having trouble with anybody, you know.[34]

What else could one conclude when sitting across the table from an arson investigator who uses phrases like "I'm totally convinced;" "you did do it;" "I have no doubt in my mind you did;" "hundred percent"? A reasonable person in these circumstances could not help but believe she was in custody after hearing accusations like those made against Jo Smith.

c. Yes, Ms. Smith was advised that she was free to leave, but only after she had incriminated herself, when it was too late to have any effect.

Investigator Summers testified he told Ms. Smith she was free to leave, and he said this advice was recorded on the videotaped interview.[35] He later amended that testimony slightly: "I thought for sure I did tell her she was free to leave."[36] An examination of the videotape reveals otherwise.[37]

In fact, neither Summers nor Guerrero told Ms. Smith that she was free to go,

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[34] [DVD.11:57:48 – 11:58:09][emphasis supplied]

[35] [H.21, 44]

[36] [H.45] Summers also testified that Ms. Smith never asked to leave, but if she had asked, he would have let her. [H.22] But such "subjective intentions are not relevant if not manifested." *Xu v. State*, 100 S.W. 3d 408, 414, n. 4 (Tex. App.–San Antonio 2002, pet. ref'd).

[37] *In re D.A.R.*, 73 S.W.3d 505, 512 (Tex. App.–El Paso 2002, no pet.)("neither was appellant told that he could leave. The door, although unlocked, was closed.").

before she incriminated herself. Instead, both investigators were careful to tell her that she was not "going to be arrested." That is, they consistently spoke in the *future* tense.

Summers: I just, like I said, right now, *after we're through with this interview*, regardless of what you tell me, you're walking home. You're going home. You're leaving the same way you came. But this is gonna happen. One way or the other.[38]

* * *

Guerrero: Now, you're not *gonna get* arrested. Okay? You're still gonna go home. But I wouldn't lie to you, I'd say, I'm gonna tell you like I tell everybody else, you'd be in trouble.[39]

* * *

Summers: I just want the truth, Jo. I, you know, regardless of what you tell me today, I'm gonna shake your hand, and I'm *gonna* walk you to that front door.[40]

* * *

Smith: So what happens to me?

Summers: Well, *today* you go home.[41]

It is true that Summers did eventually get around to informing Ms. Smith that she was not under arrest and that she was free to go. The timing of this claim is of crucial significance, though. *It first, occurred with some nine minutes left in the interview, and*

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[38] [DVD.11:59:33 – 11:59:45][emphasis supplied]

[39] [DVD.10:37:20 – 10:37:30][emphasis supplied]

[40] [DVD.11:49:16][emphasis supplied]

[41] [DVD.11:54:24 – 11:54:29][emphasis supplied]

well after Ms. Smith had admitted to starting the fire.

> Summers: Well I think that's pretty much it, Jo. Again, this was a, this was a voluntary statement, uh, you know, I asked you to come down, and you voluntarily came. You know, you're not under arrest. You were free to leave at any time, you know. I'm gonna let you leave today, you know. I'm not, you're not under arrest.[42]

It is clear from this that Mr. Summers knows how to properly advise a suspect that she is not under arrest and that she is free to go. What is telling, though, is Summers's complete failure to do so when it mattered, that is, before his suspect incriminated herself. Surely the state will not argue that Summers's after-the-fact, self-serving admonitions magically transformed a custodial interrogation to a voluntary encounter.

The critical difference between telling someone they are free to go, right now, before the interrogation begins, or before it goes on any further, on the one hand, and, on the other, that there will be no arrest until sometime later, after the interrogation concludes, was noted in *State v. Consaul*.[43] There the court recognized that: "The statement by Detective Diaz that Appellee could go home if she stated where the child was located is subject to the factual interpretation that Appellee was not otherwise free to leave the interview room until she changed her story." Indeed that is the most reasonable interpretation, and such interpretation necessarily has exactly the opposite effect than the one posited by investigator Summers. That this is true was recognized by the recent

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[42] [DVD.12:32:00 – 12:32:25]

[43] 960 S.W.2d 680, 687 (Tex. App.–El Paso 1997), *pet. dism'd as improvidently granted*, 982 S.W.2d 899 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1160 (1999).

Supreme Court case, *Howes v. Fields*,[44] where Justice Alito observed: "When a person is arrested and taken to a station house for interrogation, the person who is questioned may be pressured to speak by the hope that, after doing so, he will be allowed to leave and go home." That is no mere rumination in our case:

> Smith: If I do say that I did it, you'll let me go home now, and then, submit my case right away? And . . .
>
> Summers: I'm gonna have to really do a lot of follow up. The case will probably be submitted within maybe a month from now. It could be less time if it, if everybody I contact or bring in comes right in right away and I get the information, it could be within a month. But the way the process works is, I put the case together. I submit it to my supervisors for review. If they agree that I have everything I need, then I submit it to the district attorney's office. And then it could take them anywhere from a couple of weeks or whatever. And then, you know, somebody will be contacting you, and then you'll probably just have to go to court one day and enter a plea. You know.[45]

Within four minutes, investigator Summers got his confession when Ms. Smith admitted that she "set a little basket on fire."[46]

d. Ms. Smith was interrogated by two officers in a small, closed interview room for more than two and a half hours.

Almost 50 years ago, the *Miranda* Court stressed "that the modern practice of in-custody interrogation is psychologically rather than physically oriented."[47] Before that

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[44] 132 S.Ct. 1181 (2018).

[45] [DVD.12:00:38 – 12:01:37]

[46] [DVD.12:05:48]

[47] 384 U.S. at 448.

the Court had observed that:

> coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."[48]

Miranda addressed a specific technique used against Ms. Smith:

> "'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.'"[49]

Ernesto Miranda "was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world."[50] So was Jo Smith. The videotape makes it obvious that her interrogation was conducted in a small, closed office by two trained agents of law enforcement, bent on using every persuasive tool they had to get a confession from their suspect.

The court of appeals in *Jeffley v. State*, found that the defendant was in custody and that her unwarned statement should have been suppressed, after considering, among other

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[48] *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

[49] 384 U.S. at 449.

[50] 384 U.S. at 445.

things, "the naturally coercive nature of a police station, the authority entrusted a police officer;" that the officers pressed the defendant for a truthful statement for three hours; and that the officers never informed her that she was free to leave.[51]

In *Jones v. State*, the defendant was taken to "a small (approximately 8' x 12') interview room to meet with two officers who informed him that they were investigating" a double murder case, and that the defendant's good friend had blamed the murder on defendant.

> This was a classic police "interrogation" environment. Under these circumstances, appellant was clearly in custody for purposes of *Miranda* when he gave the Atkins statement. Thus, the Atkins statement, taken in violation of the Fifth Amendment, should not have been admitted at the punishment phase of appellant's trial."[52]

Many of the circumstances found to exist in *Miranda, Jeffley*, and *Jones* also existed in Ms. Smith's interrogation, and, as in those cases, these circumstances all militate in favor of a determination that Ms. Smith was also in custody when she was interrogated.

e. Ms. Smith asked two times whether she needed a lawyer and each time the investigator failed to fairly respond to her question.

On two separate occasions Ms. Smith asked if she needed to get a lawyer, and twice the investigator side-stepped the question.

> Smith: It sounds, do I need, do I need to get a lawyer or something, like I'm, I don't, I didn't do this. I don't . . .

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[51] 38 S.W.3d 847, 857-58 (Tex. App.–Houston [14 Dist.] 2001, pet. ref'd).

[52] 119 S.W.3d 766, 776 (Tex. Crim. App. 2003).

Summers: Jo. It's like said before. Put yourself in my shoes. Well, who would, who would wanna . . . [53]

* * *

Smith: I'm just worried I might be, I might be hurting myself more, I'm worried I need a lawyer. Do I need a lawyer right now, like?

Summers: Right now you don't, because this is just a consensual interview. You know, we're just talking. I'm, I'm gathering information, you know, and the information that I'm gathering, is the truth. You know. I just, like I said, right now, after we're through with this interview, regardless of what you tell me, you're walking home. You're going home. You're leaving the same way you came. But this is gonna happen. One way or the other.[54]

As can be seen, once investigator Summers completely ignored the question. The other time he affirmatively misled her when he told her she did not need a lawyer because he was merely gathering information.

To be clear, we are not claiming a separate constitutional violation under *Edwards v. Arizona*[55] because it does not appear that Ms. Smith unequivocally invoked her right to a lawyer by asking these questions. Nonetheless, it is difficult to understand why an experienced investigator would not fairly respond to and discuss these reasonable inquiries. The *Miranda* case certainly recognized the value of counsel to one being interrogated:

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[53] [DVD.11:43:57 – 11:43:15]

[54] [DVD.11:59:07 – 11:59:45]

[55] 451 U.S. 477 (1981).

> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."[56]

Interestingly, later, after she had incriminated herself, when Ms. Smith asked if she should "get a lawyer when I get out of here," Mr. Summers told her "to talk to somebody that you, you trust, and see what they think you should do."[57] This would have been the fair way for him to have responded to her earlier questions, but investigator Summers was more interested in obtaining his confession, and this required that he keep his suspect in the right "interrogation environment," separate from friends, family, and attorneys. This practice brings to mind another poignant observation in the *Miranda* opinion:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[58]

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[56] 384 U.S. 470.

[57] [DVD,12:06:06 – 12:07:10]

[58] *Miranda v. Arizona*, 384 U.S. at 457-58.

f. Although the investigator did not give Ms. Smith her Miranda warnings, he did tell her that this was an official interview, that it was "required or authorized by law," and that she could be prosecuted for aggravated perjury if she lied or omitted information.

Investigator Summers gave this warning to Ms. Smith less than an hour into the interrogation, and well before she said anything incriminating:

Summers: Okay. All right Jo. I just want to read to you real quick, just so you'll understand, that this, this is an official interview. Everything you say is something that you have to be truthful about, you know?

Smith: Right.

Summers: You know, no lies, no omissions, no nothing. I want the truth, today, okay?

Smith: All right.

Summers: I'll just read to you the title of this statement page. Under the Texas Penal Code, a person commits aggravated perjury, which is a third degree felony, if with intent to deceive, and with knowledge of the same meaning, he makes a false statement under oath, or swears to something that is false, of the statement previously made. *If the statement is required or authorized by law, which it is, by me,* to be made under oath and the statement is made during or in connection with an official interview, or proceeding. You understand, basically, what I'm saying?

Smith: Um hmm.

Summers: Just tell me the truth. Don't tell me any lies, that a way, you know, if you do lie to me today, not that I would, but I could, you know, press perjury charges against you. And you don't want that, right?

Smith: No.

Summers: Exactly.[59]

Certainly, Summers's speech on aggravated perjury was coercive and misleading. The italicized language – "*If the statement is required or authorized by law, which it is, by me,"*– is particularly troubling, though. After calling his interrogation an "official interview," whatever that means, Mr. Summers appears to claim that Ms. Smith's statement was "required or authorized by law." That is certainly one reasonable interpretation, and, of course, it is absolutely incorrect, given that Texans have rights not to say anything to the police under the State and Federal Constitutions. Such a remark might well have caused a reasonable person to believe that the law required her to speak to the investigator. Ms. Smith would have known she had no duty to speak to Summers, had he only advised her as required to by *Miranda* and article 38.22.

g. The investigators employed a well-known interrogation technique that is designed to elicit confessions, confidently positing Ms. Smith's guilt as fact, and acting interested only in why the offense was committed.

The *Miranda* case recognized that psychological coercion is as dangerous as physical coercion, and discussed various techniques that interrogators were taught to use:

> "To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it."[60]

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[59] [DVD.11:01:33 – 11:02:35][emphasis supplied]

[60] 384 U.S. at 449.

Investigator Summers used this coercive technique again and again.

Summers: The, the thing I need from you though, and I'm totally convinced that you're responsible for this fire.[61]

* * *

Summers: Well basically I just need the truth, because, really, I understand what happened that night.[62]

* * *

Summers: You know, I, I'm convinced you did. I have no doubt in my mind you did. What I need to know. What I need to know is, were you trying to kill her or were you just trying to scare her.

Smith: I wasn't trying to do anything.

Summers: Because when people set people's houses on fire, their intent is usually to kill them.[63]

* * *

Smith: How many times do I have to say I didn't do this?

Summers: No, but you did. I don't even want to hear that. I just want to hear why you did it.[64]

* * *

Smith: You think a hundred percent that I did this?

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[61] [DVD.11:36:44 – 11:36:47]

[62] [DVD.11:37:25 – 11:37:31]

[63] [DVD.11:40:12 – 11:40:29]

[64] [DVD.11:45:46 – 11:45:54]

Summers: Hundred percent. Hundred percent, Jo. I've talked to everybody else in that building. They're all older people for the most part. Summer was just staying with her grandmother. Its, uh, nobody was having trouble with anybody, you know.[65]

h. Another interrogation technique: The investigators minimized Ms. Smith's moral blameworthiness, casting blame, instead, elsewhere.

Miranda pointed out another familiar abusive interrogation technique.

> The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged."[66]

This technique was frequently used against Ms. Smith:

Guerrero: Uh, it was a mistake, you know, uh, the fire was. I mean, we never seen anything like this happen just out of meanness, or hardly ever.[67]

* * *

Guerrero: And, uh, he's kinda made me familiar with the circumstances, on, what happened . . .

Smith: Um hmm.

Guerrero: So, uh, I don't blame you for being mad with Bryan.

Smith: I'm sorry.

Guerrero: So, well, he's kinda explained to me that some of the stuff that has gone on between you and Bryan. . .

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[65] [DVD.11:57:48 – 11:58:09]

[66] 384 U.S. at 450.

[67] [DVD.10:28:58 – 10:29:06]

Smith: Um hmm.

Guerrero: You know, and that, uh, you came home unexpectedly also and caught him with another girl. So, uh, I'm aware of that.

Smith: Umm.

Guerrero: So, you see, those are like red flags, like, like, I explained to you earlier about red flags?

Smith: Um hmm.

Guerrero: Those are things that we look at, circumstances of the, of the case.[68]

* * *

Guerrero: But I'll be honest with you, Jo . . .

Smith: Um hmm.

Guerrero: in my experience, I've had good, god fearing, bible thumping people make mistakes, based on emotion. And 95% of the stuff that this office investigates are mistakes that are made out of emotion.

Smith: You mean, arson?

Guerrero: Yeah.

Smith: Hmm.

Guerrero: There's about 5 % of the people that we deal with that will knowingly pour gasoline in somebody's house when they know people are in there trying to hurt them.

Smith: Hmm.

Guerrero: Those people we don't deal with like this. We don't offer them a, hey

[68] [DVD.10:37:50 – 10:38:25]

you want some water. You know, no, its totally different, because its just a different deal, because they, we know what their intent was . . .

Smith: Um hmm.

Guerrero: On this fire over here, that we're gonna talk to you about, that Mr. Summers is gonna talk to you about, the intent wasn't to hurt anybody over there. Things just got out of hand. It was windy that night. Real windy. So, things just got out of hand, so, it was, it was a mistake, that fire was a mistake. He knows it, from what he has explained to me, I know it, he's even said, it was a mistake, I know it. Based out of emotions. Who's ever responsible for this, let their emotions get the best of them[69].

* * *

Summers: And, I understand that type of frustration. I, I've seen it on the job, and I, its happened to me before. You know, I've had situations where I've been so frustrated and upset, you know, somebody has hurt me so bad, that I just can't stomach it, almost. The, the pit of my stomach just gets in a ball, and it just makes me feel so upset. But you know, and sometimes we just do things. If, if we had just had another few minutes to cool down, we wouldn't have done em, because were just not that kind of person, you know. And you're not that kind of person. But that night, you were just hurt. You were just so deeply hurt that you just. And the thing of it is, you know, judges understand that. Cause they see it all the time. Crimes of passion happen every day.[70]

* * *

Summers: Well, but we all gotta deal with the consequences. And, and, they're

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[69] [DVD.10:49:45 – 10:51:04]

[70] [DVD.11:58:09 – 11:59:04]

not gonna go away. When I get your phone records, your phone records are gonna show me that you didn't go. Directly home. And I don't know what else I'm gonna find on their, but if its incriminating in any kind of way, it's gonna, my case is gonna be a slam dunk. But I would prefer to get the truth from you today. It shows, what it shows, is the fact that you, you have a soul, you have a heart, that during, during the heat of the moment, the heat of passion, you weren't in your right mind. You were so shaken and upset. All I think you were trying to do is scare this girl. I don't think you were trying to hurt her. But in the heat of the moment, we do things that we sometimes regret. And I want, I want to give you this opportunity to show that. Because that's key to, to everything. You're not the monster that they, they could have assumed you are, just based on the information that I give them, with this capital murder.

Smith: But you're assuming that I am a monster.

Summers: I don't think you are. I think you were just a hurt young girl. But you know, you roll the dice on that, they can paint you to be whatever kind of monster they want you to be. But if you tell the truth, they can't paint you as a monster. They, they will see you as you being the victim here. You're . . .

Smith: I . . .

Summers: You're being victimized by a guy who knew you cared about him and loved him, and wasn't tAtkinsg that into consideration when he was messing with all these other girls. You, its up to you. This is your opportunity. To be honest. To tell the truth. And try to minimize the circumstances that may end up digging you a deeper hole than I think you really want to fall into. I need you to tell me why you did it.[71]

4. *Ortiz, Dowthitt, Miranda*, and other cases establish that Ms. Smith was in custody when she spoke, and that what she said on March 27, 2018 must be suppressed because the proper constitutional and statutory warnings were not given.

[71] [DVD.11:49:31 – 11:51:50]

Dowthitt v. State makes it clear that Jo Smith was in custody because the officers never told her she was free to go, and because investigator Summers told her repeatedly that he was totally, one hundred percent convinced that she intentionally set the fire in question[72]. The same conclusion is also clear from the totality test set forth in *State v. Ortiz*, namely, "the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement 'comparable to . . . formal arrest,' given all the objective circumstances."[73] The objective circumstances discussed previously in this memorandum – including the accusatory statements Mr. Summers made to Ms. Smith, his failure to timely advise her that she was not under arrest and that she was free to leave at any time, the misleading warning against aggravated perjury, the unfair way he responded to her inquiries about having a lawyer, the various coercive interrogation techniques utilized, and the time, place, and manner of this interrogation process – all combine to point to a single conclusion: any reasonable person in Ms. Smith's circumstances on March 27, 2018 would have believed she was in custody. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak."[74] Accordingly, Ms. Smith should have been given the warnings

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[72] 931 S.W. 2d 244, 255 (Tex. Crim. App. 1996).

[73] 382 S.W. 3d 367, 372 (Tex. Crim. App. 2018).

[74] *Miranda v. Arizona*, 384 U.S. at 461.

required by *Miranda*, article 38.22 § 3(a)(2), and because she was not, state's exhibits one and two, and all related testimony, must be suppressed.

IV.
Ms. Smith's Statement Was Involuntarily Made And Is Therefore Inadmissible Because It Was Induced And Coerced By Law Enforcement

1. Federal and State law prevent the use of involuntary confessions.

It has long been held that involuntary confessions are inadmissible under the Fifth and Fourteenth Amendments to the United States Constitution.[75]

Article 38.21 of the Texas Code of Criminal Procedure says that: "A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed."

2. Article 38.21 is applicable without regard to custody.

Article 38.22 § 3(a) of the Texas Code of Criminal Procedure, which governs the admissibility of oral statements expressly applies only to "custodial interrogation." In contrast, article 38.21 does not require custody, explicitly or otherwise. We have shown in § III of this memorandum that Ms. Smith was in custody when the investigators took her oral statement on March 27, 2018. Regardless of whether she was in custody or not, however, if her statement was involuntary, it is inadmissible.

3. A confession is involuntary if it results from a benefit positively promised by

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[75] *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

one in authority that is of such a character as would be likely to influence a defendant to speak untruthfully.

Promises can render a confession involuntary. The test was stated in

Hardesty v. State:

> An inculpatory statement obtained as a result of a benefit positively promised to the defendant made or sanctioned by one in authority and of such a character as would be likely to influence a defendant to speak untruthfully is not admissible.[76]

4. The investigators in this case repeatedly and positively promised Ms. Smith benefits of such a character as would be likely to influence a defendant charged with a crime to speak untruthfully.

Guerrero: Worst case scenario today, and look at me and understand, is that, if you are involved in this thing, in any way, shape or form, whether you have knowledge, or you actually set the fire, whatever.

Smith: Um hmm.

Guerrero: You need to tell Mr. Summers. He's a good man. Okay. I been doing this 33 years, he's been doing it like 30. Okay. That would be the worst case scenario, for us to find out today that you're involved.[77]

* * *

Guerrero: You know, its better for it to come out a day if you are involved than to find out later, because then it shows, you know, we can't throw it away, or dismiss it completely, but I tell everybody this. If you're involved, in any way, shape, or form, then, today you have control of your own destiny.[78]

* * *

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[76] *Hardesty v. State,* 667 S.W.2d 130, 134 (Tex. Crim. App. 1984).

[77] [DVD.10:36:52 – 10:37:18]

[78] [DVD.10:44:57 – 10:45:20]

Guerrero: And, better for you to tell it today, if you are, trust me, really. Than for him to find out down the road, because, if that happens, then what you've come in here you've done is, you've lied to us today, and that, you're just, you're digging, like I said earlier, you're in control of this whole situation right now . . .

Smith: um hmm.

Guerrero: you're in control of your own destiny.[79]

* * *

Summers: I know because I've been doing this for over 20 years. I've had so many people live the exact same thing that you lived through. That's why I know. I've seen it happen before. And you know what? Its just a matter of time before I get the evidence I need to put the case together. And see what you don't understand about this, this is your one opportunity to really have a chance to explain your, you mindset that night. Because based on where I'm sitting right now, it was malice, it was premeditated, and you were trying to kill people, because when people set buildings on fire that they know people are in, they're usually trying to kill them. But I don't think that's what you were trying to do. I think you were just hurt and visibly shaken, and just wanted to scare this woman into leaving your man alone. That's what I think. But, you, right now, you're leaving me no choice. Based on the evidence and information I have right now, coupled with what I'm sure I'm gonna get later on, it's gonna be, you know, arson is one thing. But capital, attempted capital murder, is something totally different. And I just need to know the truth. I just need to know what was in your head that night, because, I don't think you were trying to kill anybody. I just think you were upset, visibly shaken, and you just wanted to scare this girl. I think you just wanted to scare her into leaving . . .

Smith: What difference does it make if your convinced that I've done it?

Summers: It, it makes a lot of difference because your mindset is what I'm trying to get a clear cut understanding of. Because if you're trying to kill somebody,

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[79] [DVD.10:53:37 – 10:53:58]

that's a totally different ball game. If you're just trying to scare somebody, that's a whole different charge. That's why I, I need the truth. I want the truth. Because I, I'm here to help you. It don't sound like it right now, but trust me . . .[80]

* * *

Smith: How many times do I have to say I didn't do this?

Summers: No, but you did. I don't even want to hear that. I just want to hear why you did it. Because when I put this case together and file it, I want to be clear. I can put this case together two ways.

Smith: What . . .

Summers: I can file it as an arson charge, or I can file it as a cap, attempt capital murder charge. I just want to be clear, because . . .

Smith: so [unintelligible]

Summers: I have every right to file it either way, based on the information that I have right now, and . . .

Smith: Against me, you have . . . ?

Summers: Well, the information I have right now. Okay? I could file the mur, the attempt murder charges, because there were people in there . . .

Smith: umm.

Summers: There were people sleeping . . .

Smith: um hmm.

Summers: that time of night somebody could have easily died.

Smith: um hmm.

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[80] [11:40:55 – 11:42:53]

Summers: People have died in the past with people setting other places on fire. Okay? That's, that's a no-brainer. I could file it that way. But if that wasn't the intent, then I can file it as an arson charge. Which is a much lesser charge. Which is, I think, the proper charge, but I don't know at this point because you're not being honest with me.[81]

* * *

Summers: But I would like for you to just tell me the truth today about what happened. How you did it, why you did it. Because right now, it looks like you were trying to kill, Summer for one. But there were over, I want to say, 30 other people in that building.

Smith: Umm.

Summers: You're thinking, you're just thinking, oh, maybe charged with one count against Summer. No. They can charge you with up to 30. Whereas that's capital murder. With arson, its just gonna be the charge of arson. You know, you're, you're rolling the dice, and you're gonna lose, and you may lose really bad. I just want the truth, Jo. I, you know, regardless of what you tell me today, I'm gonna shake your hand, and I'm gonna walk you to that front door.[82]

* * *

Summers: Well, but we all gotta deal with the consequences. And, and, they're not gonna go away. When I get your phone records, your phone records are gonna show me that you didn't go. Directly home. And I don't know what else I'm gonna find on their, but if its incriminating in any kind of way, it's gonna, my case is gonna be a slam dunk. But I would prefer to get the truth from you today. It shows, what it shows, is the fact that you, you have a soul, you have a heart, that during, during the heat of the moment, the heat of passion, you weren't in your right mind. You were so shaken and upset. All I think you were trying to do is scare this girl. I don't think you were trying to hurt her. But in the heat of the moment, we do things that we sometimes regret. And I want, I want to give you this opportunity to show that.

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[81] [DVD.11:45:46 – 11:47:02]

[82] [DVD.11:48:29 – 11:49:28]

Because that's key to, to everything. You're not the monster that they, they could have assumed you are, just based on the information that I give them, with this capital murder.

Smith: But you're assuming that I am a monster.

Summers: I don't think you are. I think you were just a hurt young girl. But you know, you roll the dice on that, they can paint you to be whatever kind of monster they want you to be. But if you tell the truth, they can't paint you as a monster. They, they will see you as you being the victim here. You're . . .

Smith: I . . .

Summers: You're being victimized by a guy who knew you cared about him and loved him, and wasn't tAtkinsg that into consideration when he was messing with all these other girls. You, its up to you. This is your opportunity. To be honest. To tell the truth. And try to minimize the circumstances that may end up digging you a deeper hole than I think you really want to fall into. I need you to tell me why you did it.[83]

* * *

Summers: I'm gonna have, I'm gonna have to file this case, and its kinda up to you, and what you tell me today, as far as how I file it. You know, stuff like this, you know, people gonna have their opinions, or whatever. They're gonna, you know, assume the worst. But I don't think you're, I don't think you're a monster. I think you're, actually, based on what I've heard about you from Bryan, you're a sweet woman. You're a loving, caring person.

Smith: I am.

Summers: You know, I don't think you intended to really hurt anybody. I just, you know, I just think things got outta hand that night. I think you were really just, you were hurt by him, and you just, that was the last straw. You, you've given him time and time again, to try to, to get it together, to see the person you really are, and treat you how you deserve to be treated. And he didn't, and he wasn't doing it. You know, that fire, that was just a, a situation where

[83] [DVD.11:49:31 – 11:51:50]

you let your emotions get the best of you for a split second. You're not an evil person. I think you . . . [84]

* * *

Smith: What does it mean? Does it mean jail time and everything, like . . .

Summers: Well, you know, that's gonna be up to a judge, or maybe even a jury. But based on my history in this job, Jo. People who have good character, people who don't have prior offenses, I mean, I'm talking about felony offenses, I'm talking about serious stuff, not traffic tickets, or misdemeanor stuff. Alot of em do get probation. Because the, the criminal justice system works like this, and you've probably seen this, if you watch the news at all. You've got people, who, DWIs, they get off time and time again, because, you know, the judge will look at their situation and think, well this person isn't really a bad person, he just made a bad judgment that day, you know. They'll have two, three DWIs, and then eventually, they'll get locked up, or whatever. It could very well be the same way with this, you know. And, and that fire that was set on that balcony, that was just meant, that was just meant to scare somebody. But on this particular night, I really think this was a factor. And, and my report will reflect this. That the fire was set intentionally. But I think due to the wind and the weather conditions, it kinda got out of control really fast. And, and that's not your fault, you know. It was just, it was you had reached a point to where Bryan had hurt you enough. Bryan had hurt you to a point where even he couldn't understand how bad he had hurt you.[85]

* * *

Summers: And like I said. It's so much better if you're just honest and up front about what happened. About why it happened. You know, and I don't think this will ever happen again. Because I think you're, you're that upset about, over all that happened. I don't think you were trying to really hurt nobody. I think you were just trying to scare her. Because you were angry.[86]

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[84] [DVD.11:54:35 – 11:56:07]

[85] [DVD.11:56:09 – 11:57:48]

[86] [DVD.11:59:45 – 12:00:18]

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Smith: What, What's gonna happen to me?

Summers: You're gonna be okay. It can be a little intimidating now, but it's a process. But, you'll be okay.

Smith: I went over there. I set a little basket on fire.[87]

* * *

Summers: That's okay. Its gonna be okay.

Smith: Is it?

Summers: Yeah, You're gonna be all right. Its, its gonna be a process. And you're gonna have to deal with the consequences, but they're not gonna be that bad. You're gonna have to just, you have to own up to the consequences, we all do, and we all make mistakes. We all have things that we regret, but, like I was telling you before, this, this paints the picture. This tells the true story. Because, before I knew about the situation that happened that night, I was convinced you and Bryan went over there and did something, but after I talked to him and understood, that he had done something stupid again, to hurt you again, and you were just so upset, then I understood that Jo did this. But what I didn't know, is Jo this monster, that was trying to kill the people in there . . .

Smith: It was just a little basket.

Summers: and see now I know. And, see, that, that weighs in your favor. I can't tell you what this is gonna mean to a judge or a jury, knowing that you didn't even . . . . That's all right. It's okay. Its all right. I understand.

Smith: I'm sorry.

Summers: That, that's okay. I understand you're upset. But this is gonna. I know you

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[87] [DVD.12:05:12 – 12:05:48]

don't think so. But this is better that I know the truth.[88]

5. State's exhibits one and two contain an involuntary confession and must be suppressed.

Investigators Summers and Guerrero repeatedly told Ms. Smith that she was guilty of burning the condominiums, and that the only question was whether she intended personal injury, or merely property damage. The latter crime was just arson; the former was either capital murder or attempted capital murder, and was much more serious.[89] To get her to confess, the investigators posed two hypotheticals, and essentially forced Ms. Smith to choose between them. Was she a sweet, caring, and loving person, indeed, a victim herself, who, in a split second, acting under the influence of passion and emotion, started a fire that, because of circumstances beyond her control got out of hand and destroyed mere property, albeit a lot of property? Or was she a "monster," who intended to kill not only Summer Atkins, but as many as 30 others. According to the investigators, their interview would be Ms. Smith's only opportunity to convince the powers that be that she had committed the smaller crime and not the larger. And if she did confess, the investigators promised they would report to the prosecutors, the judge, and the jury, in which case she

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[88] [DVD.12:07:38 – 12:09:10]

[89] Investigator Summers referred to "attempted capital murder" several times, but he also clearly said "capital murder" on at least one other occasion. In all likelihood it was just a slip of his tongue to label this crime as a potential capital murder, since no one died. If it was a slip of the tongue, though, it was an unfortunate one, since capital murder is the most serious crime that can be charged in Texas. Interestingly, Summers also erred when he said that attempted capital murder is a more serious crime than arson/habitation. In fact, both are first degree felonies.

had reason to hope for a lenient sentence, even probation.

In *Hardesty*, the court of criminal appeals reversed the trial court's decision to admit a confession. The court found that the confession had been involuntarily made because it was induced by the interrogating officer's promise not to file more than one burglary charge in Irving Texas.[90] The same is true in Ms. Smith's case. Summers's options to Ms. Smith – that she either allow herself to be charged as monster guilty of attempted capital murder (or capital murder) because she intended the deaths of 30 persons, or that she confess and allow herself to be charged as a mere property criminal with a good chance at probation – is, in the words of William Summers, a "no-brainer."

The statement contained on state's exhibits one and two was involuntary, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and article 38.21 of the Texas Code of Criminal Procedure, because it was induced and coerced by persons in authority who positively promised benefits, and these promises were of such a character that they would be likely to influence a defendant to speak untruthfully.

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[90] *Hardesty v. State*, 667 S.W. 2d at 134.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205
(210) 226-1433
mark@markstevenslaw.com
State Bar No. 19184200

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Support of Motion To Suppress Written Or Oral Statements Of Defendant has been delivered to the Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, Texas, on this the 28th day of June, 2018.

MARK STEVENS