ATTACHMENT 3

2018-2019 APPELLATE SUPPLEMENTAL MATERIALS

TEXAS YOUTH AND GOVERNMENT

IN THE COURT OF CRIMINAL APPEALS, STATE OF TEXAS

NO. 03-18-01234-CR

The State of Texas, Appellant

v.

Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Brief for _____(Appellee or Appellant)

Name (Attorney #1)
Name (Attorney #2)
School Name or YMCA Delegation

Sample Attorney Brief #1
***you will notice that this brief is over the page limit. It did have points deducted for this; however, this brief has all the required elements and is very well written. It is an excellent example of what a good brief looks like. It was the second place brief.**

Statement of the Case

Defendant Whitey Ford was charged and convicted in a trial to the court of the murder of Lou Costello. Ford appeals this conviction on two points of error relating to the admission of evidence barred by the exclusionary rule and the rules of hearsay. Ford petitions this court to reverse his conviction on those grounds.

Statement of Facts

Whitey Ford ("Ford") was convicted of the murder of Lou Costello ("Costello"). Costello was shot in the back, allegedly by Ford, and immediately run over by a car driven by Marcie Mullen. After being shot in the back and run over by a car, Costello was transported by ambulance to the hospital where he died. Before the EMT's arrived Mullen went to Costello's aid, and not surprisingly since he had just been shot and run over by a car, she found him incoherent. However, she claims that before he became unconscious Costello implicated Ford as the shooter. Mullen told Officer Bob Bullock ("Bullock"), the investigating officer, about Costello's statement and Bullock included the statement in his police report.

After Bullock cleared Mullin of any wrongdoing, he noticed that there was blood in the street and on the sidewalk. Bullock followed drops of blood to the front door of Ford's store, which was not open for business at the time. Despite the fact that he did not have a warrant, Bullock entered Ford's store and found, seized and tagged for evidence a gun of the same make and model as the gun which was later determined to have been used to shoot Costello. Subsequent to Bullock's warrantless search, and based upon the discovery and seizure of the gun at Ford's store,

a search warrant was issued. Bullock did not find any incriminating evidence at Ford's store, but at Ford's home Bullock did find and seize a note allegedly written by Costello to Ford which suggested that Ford was a criminal whom Costello intended to expose.

Ford objected to the introduction of the gun and the note into evidence in the trial. After conducting a vior dire of Bullock, the court overruled that objection and held that the evidence would be admitted. Additionally, over Ford's hearsay objection, the trial court admitted the statements made by Costello to Mullen under the dying declaration exception to the hearsay rule.

After a trial to the court, the court found Ford guilty of murder pursuant to *Tex.Pen.Code section 19.02*. Ford appeals from the trial court's verdict.

***Point of Error 1*: The trial court erred in admitting evidence of the gun as it was found as a result of an illegal search, and erred in admitting the note as the warrant issued to search Ford's home was based upon illegally obtained evidence and should have been excluded as the "fruit of a poisonous tree."**

The Fourth Amendment to the United States Constitution establishes the right of the people to be free from unreasonable search by the state unless a warrant is issued based upon probable cause supported by an oath. The Fourth Amendment applies that law to the states. *Mapp v. Ohio, 367 U.S. 643 (1963)*. The Texas Constitution likewise protects the citizens of the state from unlawful searches. *Tex. Const. Art. 1.*

It is well settled that evidence secured in violation of the search and seizure law shall be excluded at trial. *Tex.Code Crim.Proc. Art. 38.23*. With few exceptions, only evidence secured from a search conducted pursuant to a valid warrant is admissible. *Id.* A valid warrant requires that there be probable cause exists for its issuance. *Tex.Code Crim.Proc. Art. 18.01(b).* It is the judge's responsibility to determine whether a search is reasonable by considering whether the action was justified and whether the search was reasonable related in scope to the event which initiated the search.

Ford's store was closed and the door was shut at the time of the search so Ford had a legitimate expectation of privacy. *Milligan v. State, 554 S.W.2d 192 (Tex. Crim. App. 1977)*. Since the record is clear that Bullock searched Ford's store without a warrant, the only issue is whether an exception to the search and seizure law applies to these facts. Ford submits that no exception applies here, and the evidence of the gun should have been excluded.

Bullock testified in voir dire that:

1. He did not see anyone leaving the scene, so there was no risk that the killer was escaping;
2. The lights were on in the store and he could see in through the window and looked around carefully;
3. He did not see anything suspicious in the store when looking in the window;
4. He did not hear anything from inside the store;
5. No one responded to his knock or call; and
6. The door to the store was not open, and he had to force it open.

Further, Bullock gave no testimony that he even thought Costello had been shot when he entered Ford's store.

Bullock's search cannot be justified on the ground that he was suspicious or had a hunch that there might be evidence in Ford's store. In *Spring v. State, 626 S.W.2d 37 (Tex.Crim.App. 1981),* the court held on similar facts that the entry of the policeman into the defendant's apartment on mere suspicion in order to "secure and maintain" the integrity of the premises while awaiting a warrant was unconstitutional.

Moreover, there are no exceptions to the requirement that the police secure a warrant that apply to these facts.

The "emergency doctrine" allows for a warrantless search when waiting for a warrant might result in injury or death. If the police reasonably believe that someone is in need of help they can

search without waiting for the issuance of a warrant. *Brimmage v. State, 918 S.W.2d 466 (Tex. Crim. App. 1994).* The doctrine requires the presence o three factors: (1) the officer cannot be engaged in investigating the crime; (2) the officer must have a reasonable objective belief that someone's life or safety is in peril; and (3) the search must be limited to dealing with the perceived emergency. *Pitonyak v. State, 253 S.W.3d 834 (Tex.App. – Austin 2008).*

In *Gonzales v. State, 148 S.W.3d 702 (Tex.App-Austin 2004, pet.ref'd)*, the court held that even the officer had no reasonable basis for believing that another victim or perpetrator was inside the defendant's home even when there man with a bleeding chest wound outside the defendant's home.

There is no evidence that Bullock was concerned about someone being injured or dead or that the killer was still lurking around. Bullock could not have been in "hot pursuit" of the killer because he had no reasonable basis for believing there had been a shooting. All Bullock knew when he barged into Ford's store was that that Costello had been hit by a car, that there was a gun on the ground, and that Mullin reported she had heard firecracker sounds.[1] The "Emergency Doctrine" is not applicable to these facts.

The "plain view" exception likewise does not apply. The "plain view" doctrine allows an officer to seize what he sees in plain sight if the officer is lawfully on the premises. *Griffin v. State, 765 S.W.2d422 (Tex. Crim. App. 1989).* As established above, Bullock had no lawful basis for being in Ford's store, and, therefore, the "plain view" doctrine does not apply.

The note that Costello allegedly wrote to Ford threatening to expose Ford's crimes should also have been excluded. When the original search is in violation of the rights conferred by the warrant requirement, any evidence gathered as a result of the original unlawful search must also be

[1] Although other parts of the record indicate that Bullock saw blood either the night of or the day after the murder on the sidewalk and steps outside of Ford's store, Bullock did not testify to those matters in his voir dire.

excluded. *Pitonyak v. State*, *253 S.W.3d 834 (Tex. App-Austin 2008).* *Pitonyak* held that "when a search warrant is issued on the basis of an affidavit containing unlawfully obtained information, the evidence seized under the warrant is admissible only if the warrant `clearly could have been issued on the basis of the untainted information in the affidavit.'" Clearly, if the evidence of the illegally found gun is excluded, there was no or legally insufficient evidence to support issuance of the warrant.

The introduction of the poisoned evidence was obviously material to the fact finder's guilty verdict and but for that evidence, Ford would have been acquitted.

Point of Error 2: **The trial court erred in admitting the evidence of Costello's statement to Mullin as such statement is clearly hearsay which is not admissible under any exception to the hearsay rule.**

Hearsay is an out of court statement made by the declarant offered to prove the truth of the matter asserted. *Tex. R. Evid. 801(a).* The purpose of the rule is ensure that what is testified to is within the personal knowledge of the witness. *Tex. R. Evid. 801(b).* Otherwise, a witnesses' mere memory of what was said or rumors or gossip from becoming evidence. Any child who has ever played the game of "telephone" where a statement is made to one kid and then repeated in whispers around the circle can understand the wisdom of the hearsay rule. What the last kid hears seldom bears much resemblance to what was said by the first.

The State maintains that the Costello's statement is admissible under the dying declaration, excited utterance or present sense impression. However, clearly none of those exceptions apply to the facts of this case and the statement should have been excluded.

At or shortly before the time he made the statement, the following conditions were present:

1. Costello had just been shot in the back;
2. Costello had just been run over by a car which struck him with such force that he was thrown up in the air;

3. Costello was incoherent in that initially Mullin could not understand him;

4. Costello was on a vendetta against Ford;

5. Costello did not believe he was going to die.

To come within the dying declaration exception the State must prove that the Costello was aware he was going to die. *Magee v. State, 994 S.W.2d 878 (Tex.App. 1989).* Because he is about to die, it is assumed the declarant is going to be truthful and so no oath is required. *Fleming v. State, 274 S.W.2d 616 (Tex. 1925).* It must be established that the declarant had personal knowledge to which he could have testified if he had lived. *Contreras v. State, 745 S.W. 2d 282 (Tex. App. San Antonio 1987).* Conclusions and opinions will not be allowed.

In this case, it is clear that Costello did not think he was about to die because Mullin reports that he said, "next time I see [Ford], he will pay for what he has done." Since Costello was anticipating exacting his revenge on Ford, he had no impending expectation of death. Additionally, Costello allegedly said that Ford "has tried to kill me" implying that in Costello's mind, Ford had failed. Costello's statement that Ford is a "crook" and a "cheat" is mere opinion and conclusory and therefore not admissible. The dying declaration exception simply does not apply.

The excited utterance and present sense impression exceptions also do not apply. An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" *Tex. R. Evid. 803(2).* The exception applies where (1) the statement was a product of a startling occurrence that produced a state of nervous excitement in the declarant and rendered the utterance spontaneous; (2) the state of excitement dominated the declarant's mind such that there was no time or opportunity for him to contrive or misrepresent; and (3) the statement related to the circumstances of the occurrence preceding it. *Jackson v. State, 110 S.W.3d 626 (Tex. App.--Houston [14th Dist.] 2003).* The critical

factor is whether the declarant was still dominated by the emotions arising from the exciting or startling event. .

A "present sense impression" is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Tex. Rule Crim. Evid. 803(1)*. The rationale for the present sense impression exception is: (1) the statement is safe from any error from the defect of memory of the declarant because of its contemporaneous nature, and (2) there is little or no time for a calculated misstatement. ***Rabbani v. State**, 847 S.W.2d 555, 560 (Tex.Crim.App.1992).*

Costello's statements to Mullin do not meet either exception. Both exceptions contemplate that the declarant is commenting on matters that would otherwise be admissible because they are within his personal knowledge, i.e. things that the declarant could actually hear, taste, or feel. Costello's conclusory and speculative statements do not meet that test. He did not state that Ford shot him – and in fact, since Costello was shot in the back he could have no personal knowledge of who shot him. Moreover, Costello's statement The did not relate to the circumstances of the occurrence preceding it which was being hit by a car. Costello was not under the grip of excitement generated by being hit by a car. He was in the grip of his drive to exact revenge against Ford.

Since Costello's alleged statements to Mullin do not fall within any exception to the hearsay rule, the trial court erred in admitting those statements into evidence. Those statements were clearly material to the finder of fact, and but for the admission of those statements, Ford would have been acquitted.

WHEREFORE, premises considered, Whitey Ford prays that this court reverse and render a verdict of acquittal or, in the alternative, reverse and remand for a new trial, and for such other and further relief to which he may be entitled.

Conclusion

The Petitioner was entitled to a fair and just trial, but the consideration of certain evidence was absent. Also, the permitance of hearsay undermined Ford's right to a just trial.

Prayer

Whitey Ford prays that this court reverse and render a verdict of acquittal or, in the alternative, reverse and remand for a new trial, and for such other and further relief to which he may be entitled.

Respectfully submitted,

XXXXXX
XXXXXX
Attorneys for Petitioner

Sample Attorney Brief #2
***you will notice that this brief is not double spaced. It did have points deducted for this; however, this brief has all the required elements and is very well written. It is an excellent example of what a good brief looks like. It was the first place brief.**

TO THE HONORABLE COURT OF APPEALS:

Comes now, the State of Texas, and files this is appeals brief.

STATEMENT OF THE CASE

The defendant, Whitey Ford, was charged with first degree felony murder. Mr. Ford was convicted of first degree murder and sentenced to imprisonment. Two issues are presented on appeal.

STATEMENT OF FACTS

On the night of March 18, 2008, Lou Costello came to Whitey Ford's Emporium. Mr. Costello was screaming and waving a gun at appellant, and accusing him of cheating to obtain government contracts. While yelling at Mr. Ford, Mr. Costello shot a bullet at him. Even though Mr. Costello didn't hit Mr. Ford, Mr. Ford was angered. Whitey had a motive to kill Lou; Lou was spreading rumors about him. Mr. Costello had also threatened his business and reputation many times. Mr. Ford pulled out a gun and pointed it at Mr. Costello ordering him to leave. Mr. Costello did turn to leave but fired one last shot at Mr. Ford. At this point, Mr. Ford fired a shot at Mr. Costello. This shot hit Mr. Costello in the back. Mr. Costello then left the store and while crossing the street was then hit by Ms. Mullen's car. Mr. Costello was lying on the street with blood bubbling out of his mouth, when he spoke to Ms. Mullen just before he died.

ISSUES ON APPEAL

Counterpoint Number One: The trial court did not err in admitting the statement of Lou Costello at trial.

Counterpoint Number Two: The trial court did not err in admitting the evidence gathered during a search of Whiteys Emporium and Whitey Fords home.

ARGUMENT

Counterpoint Number One: The trial court did not err in admitting the statement of Lou Costello at trial.

While the statement of Lou Costello to Marcie Mullen was hearsay, it was not inadmissible hearsay. At the trial of Whitey Ford, the court properly allowed Marcie Mullen to testify as to a statement made to her by Lou Costello: "That Whitey is a real crook. Not only did he cheat me, now he has tried to kill me. Next time I see him, he will pay for what he has done." Rule 801 of the

Texas Rules of Evidence defines "hearsay" as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Vann v. State* says hearsay as an out-of-court assertion offered to prove the truth of the matter asserted. 853 S.W.2D 243 (Tex.App.-Corpus Christi 1993, pet. ref' d) Hearsay evidence is evidence which a witness offers in court which is not based on his own knowledge, but is merely a repetition of what he has been told and which is offered as proof of the truth of the matter contained or stated. *Salas v. State*, 403 S.W.2d 440 (Tex. Crim. App. 1966). The State does not dispute that the statement of Lou Costello to Marcie Mullen is hearsay. However, the statement was not inadmissible hearsay. Admissible hearsay is something that falls under an exception to the hearsay rule. Here, the statement of Lou Costello fits into several hearsay exceptions: dying declaration, present sense impression and excited utterance.

The statement of Lou Costello qualifies as a dying declaration exception to the hearsay rule. Rule 804 of the Texas Rules of Evidence provides a test for when a statement qualifies as a dying declaration are: if the declarant is unavailable, the statement was made while the declarant believed he was dying, and the statement he made was about his impeding death. The statement from Lou Costello meets all three prongs of this test. Clearly, the declarant is unavailable. Mr. Costello died the night Mr. Ford shot him. Further, the statement involved the cause of Mr. Costello's approaching death; he stated that Whitey Ford had tried to kill him. Finally, Mr. Costello was clearly dying at the time that the statement was made, even though he put on a brave front about confronting Mr. Ford at a later date. A statement can be a dying declaration even if the declarant does not specifically acknowledge his approaching death, if the nature of his injuries indicated that he had to be aware he was dying. *Thomas v. State,* 699 S.W.2d 845 (Tex.Crim.App. 1985). Here he had he had to know he was dying because the extent from the injuries that were caused by, being shot by Mr. Ford, being hit by a vehicle which was then followed by being launched into the air before hitting the ground, with blood bubbling from his mouth.

Rule 803(1) of the Texas Rules of Evidence defines Present Sense Impression as an exception to the Hearsay Rule. A Present Sense Impression is a statement describing or explaining an event or condition, that is made while the declarant was perceiving the event or condition, or immediately thereafter. Present sense impression has three requirements, which must be met before hearsay evidence can be admitted: the declarant must have personally perceived the event described; the declaration must be an explanation or description of the event rather than a narration; and the declaration must be contemporaneous with the event. *Rabbani v. State,* 847 S.W.2d 555, 558 (Tex. Crim. App. 1992 (en banc)). In this case: Mr. Costello explained the event being described – that he was shot. Further, Mr. Costello's statement, that Whitey Ford tried to kill him, describes the event that took place. Finally, Mr. Costello's statement took place immediately following the shooting. The trial record indicates that Ms. Mullen heard firecracker type sounds and immediately thereafter, she hit Mr. Costello with her car as he came stumbling into the street. She further states that she immediately stopped her car and approached Mr. Costello and he began talking to her. All indications from the trial record are that only minutes passed between the time that Mr. Costello was shot and the time that he made his statement to Ms. Mullen.

On the other hand, the statement of Lou Costello also meets the requirements to the hearsay rule found in Rule 803(2), which defines Excited Utterance as a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by

the event or condition. To determine if a statement is an excited utterance: the "exciting event" should be startling enough to evoke a truly *spontaneous* reaction from the declarant; the reaction to the startling event should be quick enough to avoid the possibility of fabrication; the resulting statement should be sufficiently "related to" the startling event, to ensure the reliability and trustworthiness of that statement. *McCarty v. State, 257* S.W.3D 238 (Tex.Cim.App. 2008, no pet. h.) The court may consider the amount of time that elapsed between the startling event and the statement. *Salazar v. State*, 38 S.W.3d 141 (Tex. Crim. App. 2001). As stated above, the statement of Lou Costello that Whitey Ford shot him was made only moments after Mr. Costello was shot. However, even the statements that Whitey Ford is was a crook and had tried to cheat Mr. Costello at some point in the past still fall under the excited utterance exception. An excited utterance exception is broad and the startling event may trigger a spontaneous statement that relates to a much earlier incident. *McCarty v. State,* 257 S.W.3D 238 (Tex.Crim.App. 2008, no pet. h). In this case, it would apply to the statements regarding Mr. Costello's earlier interactions with Mr. Ford.

The most important factor in determining whether a statement is an excited utterance is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. *Lawton v. State*, 913 S.W.2d 542 (Tex.Crim.App. 1995); *McFarland v. State,* 845 S.W.2d 824, 826 (Tex. Crim. App. 1992). This factor can be assessed by considering whether the statement was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection. Fowler v. State, 379 S.W.2d 345 (Tex.Crim.App. 1964) As the trial record shows, Mr. Costello was lying on the ground after being shot and hit by a car trying to talk about the events that caused the shooting. Given the nature of the injuries and the fact that Mr. Costello was struggling to make himself heard, it is clear that Mr. Costello was still dominated by the shock, excitement and pain of the event he was reporting.

Counterpoint Number Two: The trial court did not err in admitting the evidence gathered during a search of Whiteys Emporium and Whitey Fords home.

There are three issues this court should consider in affirming the decision of the lower court. First, the search of Whitey's Emporium and seizure of the gun did not violate Mr. Ford's Fourth Amendment rights. Second the search of Whitey's Emporium without a warrant was reasonable because there was probable cause and there were exigent circumstances. Third the warrant was not obtained illegally; therefore the evidence gathered is not fruit of the poisonous tree.

The search of Whitey's Emporium and seizure of the gun did not violate Mr. Ford's Fourth Amendment rights. The 4th Amendment guarantees that people have the right to be secure in their persons, houses, papers, and effects, free from *unreasonable* searches and seizures." U.S. Constitution Amendment IV. "To determine if a search and seizure is reasonable, the actions of the police are judged by balancing the individual's privacy interest against the government's interest and law enforcement." *Gutierrez v. State*, 221 S.W.3d 680 (Tex. Crim. App. 2007), citing *Schenekl v. State*, 30 S.W.3d 412, 413 (Tex. Crim. App. 2000). *US v. Jones* held that a warrantless search is not unreasonable if there is permission to search or if there is probable cause and exigent circumstances, which justify the invasion. *US v. Jones,* 239 F.3d 176 (5th Cir. 2001).

Here, the search of Whitey's Emporium without a warrant was reasonable because there was probable cause and there were exigent circumstances. The Texas Court of Criminal Appeals in two recent cases set forth a two step process, which the State must satisfy to justify a warrantless

search. *Gutierrez v. State,* 221 S.W.3d 680; *Parker v. State,* 206 S.W.3d 593 (Tex.Crim.App. 2006). First, there must be probable cause to enter or search a specific location, and second, there must be an emergency that requires an immediate entry to a particular place. *Id. Estrada v. State,* defined Probable Cause as: "when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality . . . or evidence of a crime will be found." *Estrada v. State,* 154 S.W.3d. 604 (Tex. Crim. App. 2005). *McNairy v. State,* defined exigency as: providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance; protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; and preventing the destruction of evidence or contraband. *McNairy v. State,* 835 S.W.2d 101 (Tex. Crim. App. 1991). As with probable cause, analysis of whether there were exigent circumstances looks at the fairness of the officer's actions, taking into account the facts and circumstances that the officer knew at the time. *Colburn v. State,* 966 S.W.2d 511 (Tex.Crim.App. 1998).

Here, the officer had probable cause to enter Whitey's Emporium without a warrant. Marcie Mullen told the officer that before Lou Costello passed out he said: "That Whitey is a real crook. Not only did he cheat me, now he has tried to kill me. Next time I see him he will pay for what he has done." Also, Ms. Mullen told the officer that shortly before she hit Mr. Costello with her car, she heard loud noises that sounded like flashes of light and heard firecrackers while she was approaching the store which she identified as Whitey's Emporium. She also stated that she saw a man standing in the window. These statements establish probable cause in two ways: First, Mr. Costello told Ms. Mullen before he died that Whitey had tried to kill him, and second, the scene of the crime was identified as Whitey's Emporium through the statements of Ms. Mullen. Probable cause that evidence of a crime might be found if Whitey's Emporium would be searched is that: the officer saw blood drops on the street and the sidewalk leading towards Whitey's Emporium, and that he found a gun lying in the street. All of these facts would indicate to an experienced officer that a crime had been committed and that the crime inside Whitey's Emporium.

Also, there were exigent circumstances present that would lead the officer to believe there was some immediate reason why he had to enter Whitey's Emporium right at that moment. First, the second part of Mr. Costello's statement to Ms. Mullen "Next time I see him, he'll pay for what he's done" combined with the gun that the officer found lying in the street would lead a reasonable officer to conclude that not only was Mr. Costello angry with Mr. Ford but also that at the time Mr. Costello was shot by Mr. Ford, Mr. Costello also had a gun. A wise officer would find it necessary to search out Mr. Ford to determine if he'd been shot as well and provide any assistance necessary. Further, Ms. Mullen testified that she had seen a man, Mr. Ford, in the window of his store just after the shots were fired.
Taken in combination with the officer's statement that when he approached Whitey's Emporium the lights were on and the door was unlocked, a wise officer could believe that Mr. Ford was inside and needed assistance. According to the officer's affidavit, based on the information he received from Ms. Mullen, he knew that something more than a car accident had occurred. The Fourth Amendment permits the warrantless seizure of evidence that is in plain view. *Cardenas v. State*, 115 S.W.3d 62 (Tex. App.--San Antonio 2003), citing *Walter v. State,* 28 S.W.3d 538, 541 (Tex. Crim. App. 2000).

Here, according to the officer's affidavit, once he entered Whitey's Emporium, he saw a gun lying in plain sight on a counter about 8 feet from the door. Given the facts present in the trial record, it is clear that the officer had probable cause and exigent circumstances that were present

when the officer entered Whitey's Emporium without a warrant. Also, the weapon seized by the officer was in plain sight. "If reasonable minds may differ' the courts should not second-guess the judgment of experienced law enforcement officers concerning the risks of a particular situation." *United States v. Blount,* 123 F.3d. 831 (5th Cir. 1997). In this case, the officer has a degree in criminology and is experienced in homicide investigations. His judgment that probable cause and exigent circumstances existed was not unreasonable. Therefore, the court should not replace its judgment for Officer Bullock's.

The warrant was not obtained illegally; therefore the evidence gathered as a result of the search is not fruit of the poisonous tree. Evidence which is fruit of the poisonous tree is evidence found because of a Fourth Amendment violation. *Crosby v. State*, 750 S.W.2d 768. However, there was no Fourth Amendment violation in this case. But, even if this court finds that the initial search and seizure did violate the 4th amendment that does not negate the validity of the 2nd search with the search warrant. Assuming a 4th amendment violation did occur, the only evidence that should be suppressed is that which was acquired by an abuse of the 4th amendment. *Id.* If this court finds the initial search to be unconstitutional the only evidence that should be excluded is the gun. The evidence found as a result of the search warrant (the note) is not tainted.

A search warrant can be issued if there is probable cause to believe: that a specific offense has been committed, that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and that the property or items composing the evidence to be searched for or seized are located at the place to be searched. Texas Code of Criminal Procedure 18.01 (C). If an illegally seized item was clearly unnecessary to establish probable cause for a search warrant, then the defendant could not have been harmed by including the tainted information in the affidavit. C*astillo v. State*, 818 S.W.2d 803 (Tex.Crim.App. 1991). Here, the gun was not necessary to establish probable cause for a warrant. The other facts and information available to the officer established probable cause were: first, there were blood droplets on the sidewalk leading towards Whitey's Emporium, second, Mr. Costello told Ms. Mullen at the scene that Whitey Ford tried to kill him, third, Ms. Mullen heard loud noises that sounded like firecrackers coming from Whitey's Emporium, just before Mr. Costello stumbled in front of her car, fourth, Ms. Mullen saw Mr. Ford standing in the window of his store watching what was going on outside, and finally, Mr. Costello had been shot. All of these facts establish probable cause for a search warrant to be issued to search Mr. Ford's store and his home for weapons or other evidence of a crime. Certainly, even the absent gun at trial, the evidence overwhelmingly establishes a basis for Mr. Ford's conviction.

CONCLUSION

The testimony wasn't hearsay and it was properly admitted. Also, the gun was properly entered into evidence at trial. Also, the evidence found as a result of the search warrant was properly admitted at trial. Because the lower court did not step out side the zone of reasonable disagreement when admitting the evidence of Lou Costello, it did not abuse its discretion. Therefore, this court must find in favor of the Respondent with regard to the hearsay issue.

PRAYER

For these reasons we pray that this court would confirm the decision of the lower court.

Respectfully Submitted By:
XXXXXXXX
XXXXXXXX
Attorneys for Respondent
XXXXXXXX School

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NO. 03-18-01234-CR

The State of Texas, Appellant

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Cameron Shepard, Appellee

FROM THE COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

Bench Brief

Judge Name
School Name or YMCA Delegation

Sample Judge Bench Brief

Whitey Ford vs. The State of Texas

I. Statement of Facts

On March 31, 2008, Lou Costello was struck by a Toyota Corolla. Costello was found to have a potentially fatal gunshot wound to his back. The driver of the car testified to having heard a noise like that of firecrackers exploding accompanied by flashes of light. Officer Bob Bullock conducted a traffic accident investigation in which he determined that the driver was not at fault. He also found a Smith and Wesson .38 caliber Model 315 revolver at the scene with two empty casings in the gun's cylinder. During this investigation, he observed drops of blood on the sidewalk leading to Whitey's Emporium and where Costello's body was. Officer Bullock entered the Emporium after knocking on the front door and calling "Open up! Police!" and receiving no answer. Inside, he found a recently fired Colt .45, tagged it, and placed it into evidence along with the Smith and Wesson .38. On the morning of April 1, 2008 (a day later), Officer Bullock obtained a warrant to search Whitey's Emporium and Mr. Whitey Ford's home. While searching the Emporium, Bullock saw blood that he had not noticed before on the doorstep. At Mr. Ford's home, Bullock found a note written by Costello saying "Expose your crimes." Because of this evidence and the results of an autopsy performed on Costello's body, Officer Bullock obtained a warrant for Mr. Ford's arrest. During the trial, the eyewitness Marcie Mullen testified as follows: "... I just tried to listen to [Costello]. While it was hard to understand everything he said, I know he said 'That Whitey is a real crook. Not only did he cheat me, now he has tried to kill me. Next time I see him, he will pay for what he has done.'" This testimony was objected to and was admitted as valid testimony. Mr. Whitey Ford has appealed the trial court's decision on two points of error – the admission of illegal evidence, based on the questionable legality of both the search warrant and of the original search, and the admission of testimony that may be considered hearsay.

II. Issues and Applicable Law

The Appellant's first point of error is that the Court allowed allegedly illegally obtained evidence in the form of the gun seized in Whitey's Emporium and in the form of the note found in Mr. Ford's home. The Appellant claims that because the search warrant was based on allegedly illegally obtained information (the gun), the evidence procured in that search should not have been

admitted as evidence (see *Brown v. State,* 605 S.W. 2d 572, 577 (Tex.Crim.App.1980)), along with the gun found in the Emporium. The Appellant's first point of error is based on Texas' statutory exclusionary rule, which says that "no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of [Texas or the United States] shall be admitted in evidence against the accused on the trial of any criminal case." Tex.Code Proc. Ann. Art. 38.23. Both the United States and Texas Constitutions affirm the right to be "secure... from all unreasonable searches and seizures." US Constitution Amendment 4; Texas Constitution Article I, I 9. In addition, the Texas Penal Code says that "a person commits an offense if he enters... property... or... a building of another without effective consent." Tex. Penal Code Ann. I 30.05(a)(1). During the appeal process, the ruling of *State v. Kelly* must be kept in mind - "When reviewing a trial court's ruling on a motion to suppress, an appellate court must view the evidence in the light most favorable to the trial court's ruling." *State v. Kelly,* 204 S.W.3d 808, 818 (Tex.Crim.App.2006). Also to be remembered is the ruling of *Wesbrook v. State* and the rule found in the Texas Rules of Appellate Procedure, both of which state that if the error involved is of constitutional magnitude, the ruling must be reversed unless it can be determined that the error did not contribute to the conviction. Tex.R.App.P. 44.2(a); *Wesbrook v. State,* 29 S.W.3d 103, 119 (Tex.Crim.App.2000) In this case, the Appellant preserved his claim of constitutional error by claiming, in the motion to suppress, that the admission of the guns and the note violated Fourth Amendment rights.

Appellant claims that Officer Bullock violated the aforementioned law when he entered Whitey's Emporium and seized the first gun, and that weapon should not have been admitted into evidence. Appellee claims that the actions were legal under the "emergency doctrine," which allows immediate warrantless access for police officers if rendering aid, preventing destruction of evidence, and/or protecting officers from people reasonably believed to be present, armed, and dangerous is required. *Estrada v. State,* 154 S.W.3d 608 n. 12 (Tex.Crim.App.2005). However, *Amador v. State* determined that "When a defendant in a criminal proceeding alleges a violation of the Fourth Amendment, the presumption that the police conduct was proper is rebutted by the defendant's showing that the search was conducted without a warrant." *Amador v. State,* 221 S.W.3d 666, 672 (Tex.Crim.App.2007). On the other hand, in *Zamora v. State*, the determination was made that "during trial, the State emphasized the use of the [alleged murder weapon]. However, any collateral implications of admitting the [weapon] into evidence and the amount of weight the jury placed on the evidence were minimal because the jury heard other substantial evidence related to [the alleged crime]." This evidence included dying words implicating the

appellant, also an issue in this case (the admissibility of which will be discussed in Appellant's second point of error). *Zamora v. State* (Tex.App.-Corpus Christi, 2004).

State v. Steelman found that "if the ruling on the motion to suppress is reasonably supported by the record and is correct under any theory of law applicable to the case, we must uphold the ruling." *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002) (citing *Romero v. State*, 800 S.W.2d 539, 543-44 (Tex. Crim. App. 1990)). All other arguments aside for the moment, if error is found to have occurred at all, the determination must be made as to whether or not the admission of the gun and the note contributed at all to the conviction of Mr. Ford - see Tex.R.App.P. 44.2(a), cited on page two.

The Appellant's second point of error is that inappropriate testimony based on hearsay was admitted. The State has said that the testimony from Marcie Mullen, an eyewitness, was admissible because the statement in question was a quote from the dying Mr. Costello that falls under both the "excited utterance" and "present sense impression" exceptions to the hearsay rule. For a "dying declaration" exception to apply, the person making the statement must believe that he/she is dying. Tex.R.Evid. 804 (b)(2). The statement showed that the declarant did not believe that he was dying ("Next time I see him..."), so the "dying declaration" exception does not apply.

The "excited utterance" exception must meet a four-part test. The statement in question must result from an occurrence "'startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.'" *State v. Powers*, 2007-Ohio-2738, quoting S*tate v. Wallace* (1988), 37 Ohio St.3d 87, 89, quoting *Potter v. Baker* (1955), 162 Ohio St. 488.

In deciding admissibility, we must use an abuse of discretion standard. *Robbins v. State,* 88 S.W.3d 256, 260 (Tex.Crim.App.2002). "The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action.

Rather, it is a question of whether the court acted without reference to any guiding rules and principles." *Montgomery v. State,* 810 S.W.2d 380 (Tex.Crim.App.1990) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), cert. denied, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986)). This means that we must look to see whether the act was unreasonable or arbitrary. *Ibid.*

According to Rule 403 of the Texas Rules of Evidence, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Therefore, it must be determined whether or not the statement in question prejudiced the jurors. However, "so long as the trial court's evidentiary ruling was within the zone of reasonable disagreement," we will not reverse the ruling. *Montgomery v. State* 810 S.W.2d 372,391 (Tex.Crim.App.2002). Also to be considered are the implications of admitting the statement. If the statement is found to be admissible, the testimony is valid and diminishes the effect of the admission of the disputed evidence (see *Zamora v. State*). However, if the testimony is found to have been inadmissible, the consequences of admitting the evidence are magnified.

III. Questions for Appellant

1. The "emergency doctrine" defined recently in *Estrada v. State* allows police to access to areas without requiring a warrant. That doctrine applies to officers who are rendering aid, preventing destruction of evidence, or protecting people from those reasonably believed to present, armed, and dangerous. How is it that none of those factors can apply in this case?
2. If Officer Bullock had obtained a warrant to search Whitey's Emporium or had not even entered the objected-to evidence, would the end results of the trial have been any different? (See *Zamora v. State*)
3. *State v. Steelman* determined that "if the ruling on the motion to suppress is reasonably supported by the record and is correct under any theory of law applicable to the case, we must uphold the ruling." In what way was the ruling on the motion to suppress incorrect under any theory of law applicable and unreasonably supported by the record?
4. Why do the "excited utterance" and "present sense impression" hearsay exceptions not apply in this case?

Questions for Appellee

1. Didn't Officer Bullock testify to having seen nothing out of the ordinary and no people in Whitey's Emporium? Didn't he also testify to not thoroughly checking the scene? What would justify the claim of exigent circumstances in this case?

2. *Amador v. State* says that " When a defendant in a criminal proceeding alleges a violation of the Fourth Amendment, the presumption that the police conduct was proper is rebutted by the defendant's showing that the search was conducted without a warrant." What is your response to this, noting that Officer Bullock did conduct the first search without a warrant?

3. The "emergency doctrine" may justify initial entry, but the purpose is to aid people in distress. How is the seizing of the weapon justified in this circumstance?

4. *Montgomery v. State* ruled that in determining an abuse of discretion in a hearsay appeal, the question is "whether the court acted without reference to any guiding rules and principles." In this issue, did the court act without reference to any guiding rules?

5. How can we determine that Mr. Costello's statement was made with his mental faculties intact? He was shot, then hit by a car -- both traumatic events in and of themselves. In addition, how can we know that Marcie Mullen's testimony is sound when we take into account the amount of time between the incident and the trial?

TEXAS YOUTH AND GOVERNMENT

FOR YOUTH DEVELOPMENT™
FOR HEALTHY LIVING
FOR SOCIAL RESPONSIBILITY

Round #:_____
Courtroom #:_____
Evaluator Name:_____

APPELLATE EVALUATION FORM

APPELLANT: Team #: _____ - School/District: _____
APPELLEE: Team #: _____ - School/District: _____

APPELLANT			APPELLEE	
Atty #1	Atty #2		Atty #1	Atty #2
		1. Knowledge and use of facts: (Using the scale of 0-5)		

a. How well did the attorney explain what happened in the case?
b. How well did these facts relate to the facts in other cases? If the attorney cited another case to support his or her argument, are the facts sufficiently similar?
c. If the attorney tried to convince the justice that another case didn't apply to this case, did the attorney successfully demonstrate why the facts were different?

Atty #1	Atty #2		Atty #1	Atty #2
		2. Knowledge and use of case law: (Using the scale of 0-5)		

a. Did the attorney cite cases that have been decided to support his or her argument in this case?
b. Did the attorney make clear the decisions of other courts and their applicability to the case at hand?

Atty #1	Atty #2		Atty #1	Atty #2
		3. Effectiveness/persuasiveness of argument: (Using the scale of 0-5)		

a. Did the attorney offer compelling reasons to support his or her position?
b. Did the attorney order his or her points understandably and appropriately?

Atty #1	Atty #2		Atty #1	Atty #2
		4. Demeanor/presentation: (Using the scale of 0-5)		

a. Did the attorney stand up straight? Make eye contact with the justice? Speak respectfully to opponents? Refrain from yelling/raising voice? Use proper grammar and avoid slang? Address all comments to justices rather than to opponents?

Atty #1	Atty #2		Atty #1	Atty #2
		5. Ability to respond to questions: (Using the scale of 0-5)		

a. Did the attorney actually answer the questions the justice asked rather than providing a non-answer?
b. After answering questions, did the attorney effectively steer the justice back to his or her argument?

Student Justice#____ School_____Performance (Using the scale of 0-5)

a. Ability to communicate grounds for decision
b. Questioning skills
c. Reasoning ability
d. Knowledge of legal procedure, law, and facts
e. Cooperation with colleagues
f. Demeanor

APPELLATE BRIEF SCORE SHEET

Attorneys _____ and _____

Form				
Cover Page	0	1	2	3
Proper Length (1-8 pages)	0	1	2	3
Proper Font & Size (Verdana, 11 pt)	0	1	2	3
Contains all required sections	0	1	2	3
Free of Grammatical Errors	0	1	2	3
Facts				
Provides a brief statement of the case	0	1	2	3
Points of Error				
Includes relevant facts	0	1	2	3
Identifies correct issues	0	1	2	3
States issues clearly and concisely	0	1	2	3
Argument/Authorities				
Logically organizes arguments	0	1	2	3
Supports arguments with case law	0	1	2	3
Uses relevant facts from case	0	1	2	3
Applies case law to facts	0	1	2	3
Proper Citation Form	0	1	2	3
Conclusion				
Requests Relief	0	1	2	3
Signed by both attorneys	0	1	2	3

Total Points _____ (48 possible)

Appellate Bench Brief Score Sheet

Judge _____

Form				
Cover Page	0	1	2	3
Proper Length (1-8 pages)	0	1	2	3
Proper Font & Size (Verdana, 11 pt)	0	1	2	3
Contains all required sections	0	1	2	3
Free of Grammatical Errors	0	1	2	3
Facts				
Provides a brief statement of the case	0	1	2	3
Issues				
Includes relevant facts	0	1	2	3
Identifies correct issues	0	1	2	3
States issues clearly and concisely	0	1	2	3
Discussion of Applicable Law				
Logically organizes discussion	0	1	2	3
Supports discussion with case law	0	1	2	3
Uses relevant facts from case	0	1	2	3
Applies case law to facts	0	1	2	3
Proper Citation Form	0	1	2	3
Questions				
Includes 5 questions for Petitioner	0	1	2	3
Includes 5 questions for Respondent	0	1	2	3

Total Points _____ (48 possible)

FOR APPELLATE OFFICE USE ONLY

ATTORNEY COMPILATION SCORE SHEET
FOR PRELIMINARY ROUNDS (PRE-SHOWCASE)

APPELLATE TEAM # _____

ATTORNEY _____
_____

SCORES

ORAL ARGUMENT (75%)

If more than one evaluator sheet per round, average the scores

Round One	_____
Round Two	_____
Round Three	_____
Round Four	_____
Round Five	_____
Round Six	_____
Round Seven	_____
Round Eight	_____
Round Nine	_____
Round Ten	_____

BRIEF (25%) _____

TOTAL SCORE _____

FOR APPELLATE OFFICE USE ONLY

JUDGE COMPILATION SCORE SHEET
FOR PRELIMINARY ROUNDS (PRE-SHOWCASE)

Judge # _____

Judge Name: _____

SCORES

JUDGING (75%) – fill in scores for rounds as applicable

If more than one evaluator sheet per round, average the scores

Round One	_____
Round Two	_____
Round Three	_____
Round Four	_____
Round Five	_____
Round Six	_____
Round Seven	_____
Round Eight	_____
Round Nine	_____
Round Ten	_____

BENCH BRIEF (25%) _____

TOTAL SCORE _____