Motion # 15 Was'nt litigated
on the Record!! There was A
hearing on Consent, but its inportent
to Note. If you go foward wite A
hearing without a motion, there's A good
chance your legal issue on Consent will
be waived. The Appeal court isn't gone
search the Record for your legal issue.
The Judge, P.A. and myself have ask
my Counsel to file motions, but his Re-
fused. I've Amended the motions and again
Requested counsel to put the motions in the
court. I've mail them copie's of the motions
And they have not open the mail, this is A
violation of ABA Rule 1.02 and/or ABA
Rule 1.03 of the Texas State Bar
And it deny my Due-process Right to A

~~Jesse~~
1910. ~~Jesse Washington~~

Fair trial.

State of Texas
V S.
Marvin Louis Guy

Cause No. 79,711
Cause No. 78,929

In District Court 27th Judicial Dis Bell County Texas

Pre Trial Motion #15
Chanllege the consent on Miranda violation statement
Amendment Motion

~~On~~ Now come the Defendant in the above entitled cause case Respectfully move the court, to surpress statement made on May 9th 2014 after search incident to arrest on the said date after surrendering & after not Rasisting Arrest And exiting my apartment ode officer slam me to the ground began to hit the back of my head with a wapon calling me nigger and how he was getting Ready to Kill me, And some point the officer clam he put his wapon inside of my mouth, this is considered a Hate Crime All though I have no memorie of that but i do remember the officer SAY; was a nigger & he was about to Kill me putting me in fear of my life. At this point I remember some officer saying To him he needed to chill out and search me at that put he pull

my shorts and underwear down and sticks something up my ass hole causing great pain. At some point he was being pulled off me, at this point some one pulled my underwear up but not my shorts.

Some time after i was question by law police, after this brutality there no way I could consent to a statement.

II

When i was being questioned i ask for a attorey for one of the question, At the point I was Requesting Counsel. The interview ending, Sometime after the officer says After being in time back to the room, saying to me the same as before. In my condition i believe my rights to counsel was still there "Miranda" was invoked She didnt give me a miranda warning before starting the second time. this is a Miranda violation And when I signed the consent card she used trickery. My consent was not giving freely and willing there fore I pray the statement be Surpressed.

This is A Amendment to pre-trial motion #15 I dont believe this motion his been put on the Record And A ruleing made on the record, A lo- of the ruleing not being made on the Record. This makes the record "mute" And wiave my issue to appeal A issue thats not on the record. There ARE to issues with counsel in this case ABA Rule 1.02 And Rule 1.03 IN Fact My inter-action with counsel they've express bias toward me and this case. IN my specking with them they also have spoke About the fear. I've spoke of this issue's in the body of conplants and motion's. Counsel Refuse A Miranda violation motion AS to the consent this I ~~SIZed~~ signed. Motion ~~#~~ 15

Signed this 17 day of March, 2020

(Your Signature)

State of Texas

County- Bell

Acknowledgment

This instrument was acknowledged before me on the 17 day of March, 2020

by Marvin Louis Guy

(Name of Principal)

(Signature of Notarial officer)

Gregory Alan Robles

(Signature of Notarial officer)

GREGORY ALAN ROBLES
Commission # 13184861-5
My Commission Expires
January 9, 2023

al)

NO. 72, 927

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	27th JUDICIAL DISTRICT
	§	
MARVIN LOUIS GUY	§	BELL COUNTY, TEXAS

PRE-TRIAL MOTION NO 15

MOTION TO SUPPRESS PHYSICAL EVIDENCE FOR LACK OF VALID CONSENT TO SEARCH

COMES NOW Defendant Marvin Louis Guy, by and through undersigned counsel, and, pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article I, §§ 9, 10, & 19 of the Constitution of the State of Texas, respectfully moves this Court to suppress physical evidence seized by law enforcement officers pursuant to an invalid consent to search.

The totality of the circumstances demonstrates that Mr. Guy's consent to search was coerced and involuntarily obtained. Mr. Guy's consent to search was procured during the course of a series of unconstitutional interrogations that were used to compel Mr. Guy to give an involuntary statement. Because the statements made during Mr. Guy's interrogation were involuntary under Texas law and the United States Constitution, his consent to search must likewise be held to be involuntary. Mr. Guy involuntarily consented to the search of his apartment, and any evidence obtained pursuant to his coerced consent must be suppressed as the fruit of an unreasonable search. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Mr. Guy requests a hearing on this motion.

In support thereof, Mr. Guy states as follows:

I. Relevant Facts

Mr. Guy, a man whom lacks average intelligence, is charged with one count of capital murder of a police officer and three counts of attempted capital murder in relation to events that occurred on May 9, 2014, during a "no knock" raid of his home by the Killeen Police Department (KPD) and members of the Bell County Organized Crime Unit (BOCU). Mr. Guy's girlfriend, Shirley Whittington, was also sleeping in his home that night. After the shooting stopped, Mr. Guy surrendered to police officers from the back door of the unit. It is undisputed that he was unarmed at the time of his arrest. Multiple law enforcement officers on the scene held their guns on Mr. Guy while Detective Juan Obregon of the Killeen Police Department took Mr. Guy into custody.

According to Det. Obregon's supplemental report (attached as Exhibit 1), he ordered Mr. Guy to put his hands in the air as he came out the door. Mr. Guy complied. With his empty hands in the air, Mr. Guy "jumped on the ground face first when he came out." Exhibit 1 Mr. Guy crawled towards the officers as Det. Obregon instructed. *Id.* According to Det. Obregon, he then "grabbed [Mr. Guy] by the shorts and pulled him further around the corner [of the house]," where he held him facedown with his knee into Mr. Guy's back. *Id.* While Mr. Guy was on the ground, Det. Obregon restrained him with handcuffs. *See* Exhibit 2 (Supplemental Report of Officer Christopher Morris). Det. Obregon had his gun already drawn and pointed at Mr.

Guy as he directed him towards the ground and held him facedown, pinning him to the ground.

Det. Obregon then put his gun to Mr. Guy's head and yelled, "IF YOU MOVE, I WILL KILL YOU DON'T YOU FUCKING MOVE, WHO IS INSIDE WHO SHOT, FUCKING TELL ME NOW."[1] Exhibit 1. As he held Mr. Guy down with his knee in his back, Det. Obregon noticed that Mr. Guy was struggling to breathe, so he "removed [his] body from his back." *Id.* Det. Obregon kept his gun to Mr. Guy's head and yelled "MOVE AND I'LL [sic] KILL YOU. WHERE IS THE GUN WHO ELSE IS INSIDE." *Id.* When he heard Officer Dinwiddie was hit, Det. Obregon writes, he "became very enraged with anger" and "struck [Mr. Guy] with [his] pistol in the mouth area." *Id.* Obregon averred that he "did not strike [Mr. Guy] hard enough to leave any visible marks," but admits that he "did enter [Mr. Guy's] mouth with [his] pistol." *Id.*

When Det. Obregon shoved the barrel of his gun in Mr. Guy's mouth, he "noticed [Mr. Guy] spit up" so he removed the barrel of his pistol and again held it to the side of Mr. Guy's head, yelling, "YOU MOTHER FUCKER WHO SHOT? DID YOU SHOOT? WHO ELSE IS INSIDE." Exhibit 2. At this point, other officers pulled Det. Obregon off of Mr. Guy and directed Det. Obregon to take a different position.

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[1] Detective Obregon was disciplined by Internal Affairs for using excessive force in despite the fact that Mr. Guy "offered no resistance and complied with the orders of officers and was lying on his chest on the ground. Exhibit 3 at 8 ("Excessive Use of Force" Report of KPD Internal Affairs Investigation). The investigation found, *inter alia*, that Det. Obregon violated policy when he "verbally and physically threatened [Mr. Guy]," "verbally threatened to kill him and used his weapon as a tool of intimidation in those threats," "used his weapon to strike [Mr.] Guy in the mouth," and "placed his gun in [Mr.] Guy's mouth." *Id.* at 8-9.

Another officer immediately, escorted Mr. Guy from the premises and transported him to the Killeen Police Department.

At the police department, Mr. Guy was taken to the interrogation room and subjected to increasingly lengthy interrogations every two hours following his initial interrogation. *See* Exhibit3 (Composite Transcript of Discs 1-3, Interrogation of Mr. Guy).[2] Mr. Guy had no more than three hours of sleep before the raid, and just two hours passed from the moment the raid began at 5:30 am until the detectives began to interrogate Mr. Guy.

According to police records, Killeen Detectives Brank and Martinez began to interview Mr. Guy at 7:35 am on May 9, 2014.[3] The written waiver of *Miranda* provided in discovery indicates that the form was filled out at 7:38 am, and Mr. Guy initialed the waiver at 7:45 am. Exhibit 4 .[4]

The warning reads, in pertinent part:

2. "...any *statement* I make may be used against me in court."

3. "...I have the right to have a lawyer present to *advise* me prior to *and during* any questioning." [...]

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[2]Due to the pagination of the transcript, excerpts from the first interrogation will be referred to ask "Tr. 1 at [pg]," the second interrogation as "Tr. 2 at [pg]," and the third as "Tr. 3 at [pg]."

[3] It is indisputable that Mr. Guy was under arrest at this time, as he had been taken into custody at gunpoint, handcuffed by officers while being physically restrained, and transported involuntarily to the police department. His liberty was constrained *beyond* the degree of a formal arrest, and no reasonable person under the circumstances would feel free to leave. *See Kaupp v. Texas*, 583 U.S. 626, 630 (2003) (involuntary transport to a police station in handcuffs by a group of police officers sufficiently like formal arrest to trigger Fourth Amendment protections).

[4] The form on which the KPD elicited informed consent from Mr. Guy is headed "Voluntary Appearance for Investigation Purposes Only," but Mr. Guy did not sign the statement affirming that he was giving the statement voluntarily and, as explained in n. 2, *infra*, he was clearly in custody under any legal definition of the term.

5. "...I have the right to terminate the interview at any time."

Exhibit 4 (emphasis added).

During the initial interview at the station, the detectives attempted to persuade Mr. Guy multiple times to give a written statement. The first time he was asked to write a statement, Mr. Guy said: "No ... I don't want to write a statement until I have a lawyer present" and "to write a statement, I would like to have a lawyer present." Tr.1 at 62-2.

Mr. Guy expressed concern for Shirley's condition and her current state of incarceration. Accordingly, Detectives Brank and Martinez next attempted to convince Mr. Guy that he should write a statement to clear his girlfriend, Shirley Whittington, of any criminal liability.

> MR. GUY: And I heard her [Shirley] scream. That's the last thing I heard. And then I could see her come in here.
>
> DET. BRANK: Okay. And that was another reason why I'm asking you for a written statement. You said Shirley had nothing to do with this whatsoever.
>
> MR. GUY: Nothing.
>
> DET. BRANK: That would clear her out of this picture. But that's your choice.
>
> MR. GUY: **Anything to clear her, man, I'm willing to do.**

Tr. 1 at 68.

> DET. BRANK: We need to understand why all of this happened the way it happened. And the first thing you said when you came ... was that Shirley had nothing to do with this.
>
> MR. GUY: And she didn't.

DET. BRANK: Man, don't drag her down because you're trying to save face for you. If this woman absolutely had nothing to do with it, get her name out of this picture fully. Don't drag her through this.

MR. GUY: But that's—she's not going to go home today though, you know.

DET. BRANK: **She'll go home as soon as they can determine she has nothing to do with it.**

Tr. 1 at 73.

DET. BRANK: Man, you're screwing her up. You're screwing her up. Don't do that to this woman you say you care about. Even though you argue and your relationship is screwed up a little bit.

MR. GUY: "**I have to have an attorney to advise me on this.**"

Tr. 1 at 74.

The detectives continued to question Mr. Guy for several more minutes, at which point he unequivocally stated:

MR. GUY: Only thing I can say, man, is, you know, **I'm done. I'm done** ... you guys talk to Shirley right now ... I would rather have a lawyer before I make a written statement.

DET. BRANK: Okay. So you don't want to do the statement?

MR. GUY: Yeah.

DET. BRANK: All right.

MR. GUY: **I would like to have a lawyer.**

DET. BRANK: All right.

MR. GUY: **I would—I would like to be advised.**

DET. BRANK: All right ... let me tell you this, *is Shirley going to tell us anything differently than you told us about how all this went down?*

Tr. 1 at 77.

The detectives continued to question Mr. Guy, and elicited numerous statements from him regarding the circumstances of the raid and the events surrounding the shooting. *See* Tr. 1 at 77-96. Often invoking Ms. Whittington's lack of participation and potential involvement in the prosecution in their efforts to elicit a written statement from Mr. Guy, despite his invocation of counsel and statements that he wanted to cease the interrogation, the detectives continued the questioning until 8:39 am.

Several hours later, Detectives Brank and Martinez returned Mr. Guy to the interrogation room to record their request for consent to search the apartment. *See* Tr. 2. Mr. Guy remained in continuous custody at the Killeen Police Department. No counsel was provided to him in the interim, despite his invocation of counsel during the previous interview.

As soon as the detectives escorted Mr. Guy back into the interrogation room, he asked if Ms. Whittington was going to be alright. Tr. 2 at 2. Detective Brank told him that she was "banged up a little bit." *Id.* Detective Brank said that the warnings they gave him earlier "are still in effect" and asked Mr. Guy if he was "still good talk[ing] to [the police]." *Id.* Mr. Guy agreed. Detective Brank then told Mr. Guy that she wanted "to kind of speed the process along out on scene," and "[i]t will be a lot quicker if [he] give[s] consent to search [his] house." Tr. 2 at 2.

As he acquiesced to the detective's request, Mr. Guy asked, "Oh man. [Is Ms. Whittington] banged up pretty bad? Are they going to let her go?" Tr. 2 at 3. Detective

Brank responded that the police are "still working on that." *Id.* The detective continues to fill out the search form, and Mr. Guy again asked, "Is Shirley alright? Man. She just banged up bad?" Tr. 2 at 4. Detective Brank told Mr. Guy, "Shirley—she's okay ... she's banged up. So [the police need the consent to search] just to kind of speed it up a little bit." Tr. 2 at 2. "So the quicker we get this, the quicker we can get her out." *Id.*

Mr. Guy had no more than three hours of sleep before the raid, and no more than two hours passed between the 5:30 am execution of the raid and the initiation of custodial interrogation by Killeen Police detectives. The interrogation continued throughout the day, lasting approximately eight hours in total; at no time was Mr. Guy provided with an attorney, despite his requests.[5]

II. The Search Should be Suppressed Because, Considering the Totality of the Circumstances, Mr. Guy Did Not Freely and Voluntarily Consent to the Search.

A search may be considered valid if a person freely and voluntarily consents to the search. Whether consent was freely and voluntarily given is determined by looking at the totality of the circumstances surrounding the consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973). The Fourth and Fourteenth Amendments require that consent not be coerced, by explicit or implicit means, by implied threat or covert force. *Meekins v. State*, 340 S.W.3d 454, 459 (Tex. Crim. App. 2011) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973)). Whether a person's consent to

[5] Killeen Police repeatedly ignored at least six requests for an attorney throughout the interrogation, *see* Tr. 1 at 62-63, 74, 77; the constitutional violations inherent in this particular police action will be addressed in Mr. Guy's separate Motion to Suppress Statements.

search was voluntary is a question of fact to be determined in each case from the totality of the circumstances of the particular situation. *Meekins,* 340 S.W.3d at 459.

Generally, consent to search is voluntary if and only if a reasonable person would feel free to decline the request or otherwise terminate the encounter *Florida v. Bostick*, 501 U.S. 429, 429 (1991). In determining the voluntariness of consent, courts may look to a variety of factors, including violence, threats, promises, and the mental condition and capacity of the defendant. *Meekins,* 340 S.W.3d 454, 459 (Tex. Crim. App. 2011). The defendant's lack of awareness about his right to refuse the search is another relevant factor that, although not dispositive by itself, weighs in favor of finding that consent was not voluntarily given. *Harrison v. State,* 205 S.W.3d 549, 553 (Tex. Crim. App. 2006). When the voluntariness of consent to search is challenged, the State has the burden of proving, by clear and convincing evidence that consent was freely and voluntarily given, without any duress or coercion. *Allridge v. State,* 850 S.W.2d 471, 493 (Tex. Crim. App. 1991).

Other relevant factors include whether the consent was in response to officer questioning, and whether consent was the result of flagrant police misconduct. *Gallups v. State*, 104 S.W.3d 361, 366 (Tex. App.—Dallas 2003), *aff'd,* 151 S.W.3d 196 (Tex. Crim. App. 2004). Here, a constellation of relevant factors militates in favor of the involuntariness of Mr. Guy's consent, including:

(1) implied promises;
(2) (lack of) awareness of constitutional rights;
(3) flagrant police misconduct;
(4) consent as a result of police questioning; and
(5) physical condition.

Additionally, Mr. Guy's consent to search was procured during the course of a series of unconstitutional interrogations that were used to compel Mr. Guy to give an involuntary statement. Because the statements made during Mr. Guy's interrogation were involuntary under Texas law and the United States Constitution,[6] his consent to search must likewise be held to be involuntary.

Under Texas law, the State bears the burden of establishing by clear and convincing evidence that a party consented to a search. *State v. Ibarra*, 953 S.W.2d 242 (1997). In contrast, the Fourth Amendment to the United States Constitution requires the government to establish voluntary consent by a preponderance of the evidence. *See Montanez v. State*, 195 S.W.3d 101 (Tex. Crim. App. 2006) (discussing difference in burden of proof on voluntary consent searches). Mere submission to an officer's claim of lawful authority is not effective consent. *Juarez v. State*, 758 S.W.2d 772, 775 (Tex. Crim. App. 1988). For the reasons set forth below, the "consent" in question in this case cannot withstand scrutiny and must be stricken

A. Officers Made Implied and Explicit Promises to Mr. Guy to Secure his Consent to Search, a Factor Militating in Favor of a Finding of Involuntariness.

Although Mr. Guy signed a consent to search form, his consent was the product of implicit coercion. Detectives asked Mr. Guy to sign a consent to search form during Mr. Guy's second interrogation of the day. Immediately prior to asking Mr. Guy to sign the form, the detectives told Mr. Guy, "[Ms. Whittington]'s banged up pretty bad." The detectives induced Mr. Guy to sign the form through implicit coercion,

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[6] *See* n. 5, *supra*.

using his loved one to manipulate Mr. Guy's consent. Such coercion renders his consent involuntary.

Mr. Guy's fear for Ms. Whittington's safety was not a merely subjective concern. Officers *explicitly* told Mr. Guy that Ms. Whittington was "banged up" and "scared." Tr. 2 at 4 and 5. When Mr. Guy declined to make a statement without a lawyer present, officers told him that his lack of cooperation was "screwing her up" and urged him "don't do that to this woman you say you care about." Tr. 1 at 74. The detectives continued to emphasize Mr. Guy's responsibility to Ms. Whittington and insinuate that he could help—or hurt—her by his conduct throughout the interrogation.

Furthermore, Mr. Guy's belief that his acquiescence to the officers' request would help Ms. Whittington was not merely subjective speculation—it was actively cultivated by the detectives' statements. When Mr. Guy asked about Ms. Whittington, he was told that his consent to search would "speed up the process" and "the quicker we get this [consent form signed], the quicker we can get her out." Tr. 2 at 5. Mr. Guy's consent was induced not by his own subjective concerns, fears, or hopes, but by *specific promises* from detectives that his injured girlfriend would be released sooner if he waived his rights with regard to the search.

Because Mr. Guy's consent was the result of *specific promises* regarding his loved one's well-being, his consent is thus readily distinguishable from the consent given in cases in which defendants' subjective concern for loved ones was held not to vitiate consent. *See, e.g., Lackey v. State* 638 S.W. 2d 439, 451 (Tex. Crim. App. 1982).

In *Lackey*, the purely subjective nature of the defendant's concern was dispositive, and the Court took care to note that officers never mentioned anything about the defendant's children's well-being to her. *Id.* The Court further noted that the facts leading up to consent in *Lackey* did not include any police misconduct that should be deterred. *Id.* By contrast, Mr. Guy was subjected to a lengthy pattern of misconduct, and his concern for Ms. Whittington was cultivated and willfully exploited by officers to gain his cooperation. Mr. Guy's consent was simply a response to detectives' antagonistic and exploitative actions.

In *Flores v. State*, the Houston Court of Appeals held that "antagonistic action by the police against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent given by the suspect." 172 S.W.3d 742, 752 (Tex. App.–Houston 2005). Mr. Flores was detained after officers executed an arrest warrant at his house. *Flores*, 172 S.W.3d at 746. Mr. Flores lived with family, and the detectives told him that declining the search meant his family would be forcibly vacated so police could secure the residence. *Id.* After talking to his family, Mr. Flores gave officers consent to search the house. *Id.* Taking all of these facts under review, the Houston Court of Appeals found that Mr. Flores did not give his consent voluntarily. *I* at 752. The Court noted the officers' lack of probable cause prior to a pat down, and the officers' antagonistic threats regarding Mr. Flores's family. *Id.* The Killeen detectives similarly used antagonistic tactics and exploited Mr. Guy's concern about Ms. Whittington to coerce consent from Mr. Guy here.

Unlike *Lackey*, where no police misconduct occurred prior to the consent to search, *Flores* illustrates the involuntariness of a search when (1) police misconduct occurs prior to consent and (2) the consent is procured through threats against the arrestee's family. *Flores* holds here. Again, the facts are strikingly similar to this case. Without colorable probable cause, and acting on the tip of an informant, officers conducted a no-knock raid, arrested Mr. Guy using excessive force,[7] and then obtained his consent to search in an unbroken chain of events. Just like the defendant in *Flores* who was threatened with his family's impending homelessness, Mr. Guy was threatened with Ms. Whittington's impending criminal liability and injured condition.

While the defendant in *Flores* was concerned that his loved ones would be homeless if he did not consent to the search, Mr. Guy was concerned that Ms. Whittington would not receive necessary medical care unless he consented to the search. Even worse, whereas the appellant in *Flores* could discuss his decision with his family, Mr. Guy was left suspended in anxiety with no indication of Mr. Whittington's condition. This lack of certainty, manipulated by the detectives, played a definitive role in securing Mr. Guy's signature.

Texas case law is clear. When a consent to search is the product of coercion or veiled threats, such consent is involuntary. Consent procured after antagonistic action towards a close loved one is highly suspect. *Flores,* 172 S.W.3d at 752. When Mr. Guy heard that Ms. Whittington was hurt, he could only assume that her

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[7] *See* Exhibit 3 (Excessive Force Internal Affairs Report and Findings).

condition would deteriorate until she received treatment. He was assured by officers that by signing the form he would secure her release and hasten her treatment. In Mr. Flores's as well as Mr. Guy's experience, something of value to the arrestee—his closest relationships—was exploited to procure the arrestee's consent.

Furthermore, officers engaged in a pattern of behavior that deprived Mr. Guy of any reasonable expectation that his right to withhold consent to the search would be honored if he chose to invoke it. The detectives' implied promise to help Ms. Whittington was in exchange for something that Mr. Guy simply did not believe he could withhold in the first place. By failing to respect Mr. Guy's numerous requests for counsel throughout the interrogation, the detectives sent a clear message to Mr. Guy that any invocation of his constitutional rights was futile. The detectives' repeated refusal to honor Mr. Guy's requests for an attorney, and continued questioning despite his invocations, greatly diminished any credibility the State might place on the consent obtained in the midst of this process. As far as Mr. Guy could tell, his options were to attempt to invoke his rights (and have them ignored yet again) or waive them and potentially secure help for Ms. Whittington. Because determining voluntariness requires an analysis of the totality of the circumstances, the implied promise here works alongside a myriad of other factors to render Mr. Guy's consent involuntary.

B. Mr. Guy's Repeated Attempts to Invoke His Right to Counsel During Interrogation Were Consistently Disregarded, a Factor Militating in Favor of a Finding of Involuntariness.

While Mr. Guy signed a consent form, and detectives read Mr. Guy his rights, neither of these constitutional safeguards prevented Mr. Guy from involuntarily consenting. In fact, the reading of defendant's *Miranda* rights—and subsequent violation of those rights—ironically proves that Mr. Guy had little reason to believe a choice existed.

Mr. Guy requested an attorney soon after the detectives began to interrogate him. No attorney was ever provided. After repeatedly emphasizing that he wanted a lawyer before providing a written statement, *see* Tr. 1 at 62-63, 74, Mr. Guy finally stated, "I'm done. I'm done ... you guys talk to Shirley now . . . I would like to have a lawyer . . . I would like to be advised." Tr. 1 at 77. No attorney was ever provided to Mr. Guy. The detective would later say during the second interrogation that the "*Miranda* warnings that I gave you earlier are still in effect." Tr. 2 at 69. Mr. Guy did not benefit from the *Miranda* warnings that were "still in effect" because an attorney was never provided for him. Although Mr. Guy was aware of his *Miranda* rights, Mr. Guy was also aware those rights would not be honored.

Mr. Guy's, less than average intellect, and lack of awareness of his constitutional rights colored his second interrogation. When detectives came to interview Mr. Guy a second time, he was *not* aware that (1) he had a right to refuse the search and, (2) his answer would be honored. Moreover, nowhere on the form does it say "You have the right to refuse a search." *See* Exhibit 4 (Consent to Search Form).

Nor did the detectives affirmatively mention his constitutional right to refusal. Even if Mr. Guy had refused the search, it was not clear that detectives would honor his wishes given their past violation of his rights. The search of Mr. Guy's house would appear inevitable given Mr. Guy's understanding of his constitutional rights.

Mr. Guy's knowledge regarding a right to refuse would normally be a constitutional safeguard militating in favor of voluntariness. *See Cooksey v. State*, 350 S.W.3d 177, 188 (Tex. App.–San Antonio 2011). However, Mr. Guy was never informed of his right to refuse the search. In fact, Mr. Guy was told to fill out the consent form after he expressed opposition to the search. These circumstances militate in favor of involuntariness, notwithstanding the repeated constitutional violations chronicled below. *Frierson v. State*, 839 S.W.2d 841, 851 (Tex. App.–Dallas 1992, pet. ref'd).

Detectives told Mr. Guy that the process on the scene could be sped along if Mr. Guy consented to a search of his apartment. Detectives asked Mr. Guy "do you have a problem with that?" Tr. 2 at 2.

Mr. Guy: "In my house? Apartment?

Detective: "Yes."

Mr. Guy: "Oh, yeah. Yeah."

Tr. 2 at 3.

Thus, Mr. Guy's answer to the question, "do you have a problem with [consenting to a search]?" was "yeah." At best, this exchange was ambiguous—however, the transcript in fact indicates that Mr. Guy expressed a problem with the

detective's request. Despite Mr. Guy's answer to the question, detectives began filling out the consent form on his behalf. They did not address the fact that, when asked if he had a problem with the search, Mr. Guy answered in the affirmative. Detectives did not accept Mr. Guy's answer to their question or even attempt to persuade him to change his answer; instead they simply proceeded as though he had given an answer that clearly was not given. As with the previous *Miranda* violations, officers flatly ignored Mr. Guy's invocation of his rights and proceeded as though his rights had not been invoked.

By the time the consent form was given to Mr. Guy for his signature, officers had consistently ignored his invocation of his right to counsel and questioned him in violation of that right, they had continued to press him for a statement long after he invoked his *Miranda* rights, and they had proceeded to fill out a consent form after he told them he had a problem consenting to a search. Mr. Guy explicitly invoked his rights on several occasions, and he was ignored every time. Moreover, Mr. Guy was in the dark about the actual existence of his right to refuse. In light of this pattern of behavior, Mr. Guy could not have reasonably expected that his right to refuse consent for the search would actually have been honored if he had withheld his signature.

In *Reasor v. State*, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000), the Court of Criminal Appeals held that a consent to search was voluntary where the defendant was (1) read his *Miranda* rights twice, (2) sufficient time elapsed between a prior illegal search and defendant's consent. The defendant in *Reasor* was arrested following an illegal protective sweep that returned no incriminating evidence. 12

S.W.3d at 818. Following the arrest, the handcuffed defendant gave officers a signed consent to search form. *Id.* The defendant in *Reasor* was consistently made aware of his right to remain silent. *Id.* Furthermore, while the arresting officers did conduct an illegal search, the same officers let the defendant's companion leave prior to defendant's consent. *Id.* Letting the companion go, the Court noted, underscored the reasonableness of the officers. *Id.*

This case is distinguishable from *Reasor*. Mr. Guy's consent was involuntary in light of his violated rights and fear about the safety of his girlfriend. Although the detectives here perfunctorily reminded Mr. Guy of his rights, the reasonable police officers in *Reasor* let the defendant's companion go. In contrast, Mr. Guy's companion was not let go, and given the detectives refusal to recognize Mr. Guy's right to counsel, Mr. Guy simply had no reason to believe the detectives were reasonable. The police officers who arrested Mr. Guy and his girlfriend in fact used Ms. Whittington's detention to their benefit—a far cry from reasonably letting Ms. Whittington ride to the hospital after the raid. Mr. Guy's consent to search was thus the product of implicit coercion in the form of meaningless "rights." Not only did detectives violate his right to invoke counsel, they violated his right to refuse a search through coercion.

Importantly, the Court of Criminal Appeals has indicated that "societal good" is a relevant point of measure when determining if evidence should be excluded due to coercion. In *Lackey v. State*, the Court found that "[t]he conduct of the officers in obtaining consent was not offensive nor violative of anyone's constitutional rights. No societal good would be served by excluding from evidence the items found at

appellant's residence." *Lackey*, 638 S.W.2d 439, 452 (Tex. Crim. App. 1982). The detectives who questioned Mr. Guy undoubtedly violated Mr. Guy's constitutional rights. Refusing to honor Mr. Guy's *Miranda* invocation was a brazen violation of Mr. Guy's rights. Societal good would indeed be served by excluding the evidence found in Mr. Guy's apartment. Such a holding restores Mr. Guy's constitutional protections and further inoculates Mr. Guy from grievous constitutional harm during trial.

C. Arresting Officers Engaged in Excessive Force and Flagrant Police Misconduct in Effecting Mr. Guy's Arrest, a Factor Militating in Favor of a Finding of Involuntariness.

Outrageous and flagrant police misconduct is yet another factor that weighs heavily in Mr. Guy's favor. The questioning detectives' most important affirmative duty to Mr. Guy was acknowledgment of his *Miranda* rights. In refusing to honor Mr. Guy's constitutional rights, the questioning detectives capitalized on a pattern of police misconduct that culminated in Mr. Guy's involuntary consent to search. While time passed between Detective Obregon's misconduct and the improper conduct of the questioning detectives, Mr. Guy spent that time in a constant state of fear. Mr. Guy's fear while in custody was at every stage exaggerated by further police misconduct.

Mr. Guy's own experience of police assault, in tandem with other factors, necessitates a finding of involuntariness. Again, unlike the defendant in *Reasor*, Mr. Guy's companion was not let go. Ms. Whittington was unnecessarily, tackled by police (resulting in broken ribs) and taken into custody. While Mr. Guy awaited word on Ms. Whittington's condition, detectives continued to question him. Mr. Guy was still

extremely concerned for Ms. Whittington's well-being during the second interrogation. Nothing—from the first instance of physical assault to the continual questioning in Mr. Guy's rights—gave Mr. Guy an indication that detectives were being reasonable.

Officers engaged in a consistent pattern of misconduct against Mr. Guy, beginning with the use of excessive force during his arrest, continuing throughout his interrogation in violation of his right to counsel, and culminating in the officers filling out a consent to search form immediately after Mr. Guy voiced objection to the search.[8] Over the course of many hours, Mr. Guy was shown again and again that officers would not respect his rights, and finally he was asked to trade his rights for an improperly offered promise to help a loved one.

During his arrest, Mr. Guy was pinned to the ground face down.[9] Officer Obregon then held his gun to Mr. Guy's head and threatened multiple times to kill him while aggressively questioning him about who else was inside the house. *Id.* This plainly unacceptable and excessive use of force culminated in Officer Obregon pushing the barrel of his gun into Mr. Guy's mouth, only removing it when he saw Mr. Guy spit up as a result.[10] Within hours of this violent and obviously terrifying encounter, officers commenced an interrogation in which they repeatedly violated Mr. Guy's Miranda rights.

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[8] *See* Exhibit 3 (Excessive Force IA Report).
[9] Exhibit 1 (Obregon Supplemental Report).
[10] Exhibit 2 (Morris Supplemental Report).

Prior to the encounter in which Mr. Guy was asked to consent to a search of his home. He stated that he wanted a lawyer present five times. Tr. 1 at 63, 69,77. Officers continued to question him without a lawyer present despite his unequivocal requests six times. On one occasion, he attempted to cut off questioning by saying "I'm done. I'm done.... you guys talk to [Ms. Whittington] right now." Tr. 1 at 77. Almost immediately after saying "I'm done," Mr. Guy said "I would like to have a lawyer," and "I would like to be advised. Tr. 1 at 77. In spite of all his objections, officers continued to question him in clear violation of his *Miranda* rights. The insistent police questioning following egregious police misconduct produced Mr. Guy's involuntary consent. Moreover, detectives neglected to inform Mr. Guy of his right to refusal—yet another factor weighing in favor of involuntariness.

D. The Consent to Search Form Did Not Inform Mr. Guy that He Had the Right to Refuse to Consent, a Factor Militating in Favor of a Finding of Involuntariness.

The form Mr. Guy signed was constitutionally deficient. Mr. Guy reserves the constitutional right to refuse a search. A consent to search form that fails to mention a right of refusal is evidence of involuntariness. *Allridge v. State*, 850 S.W.2d 471, 493 (Tex. Crim. App.1991). The consent to search form Mr. Guy signed states as follows:

> I [Marvin Guy] give consent to the Killeen Police Officer named below and any officers working with him to search the following described property of which I have care, custody and control. (signature) My consent is being given freely and voluntarily and I have not been subjected to any threats, promises, compulsion, persuasion or coercion of any kind. (signature)

Exhibit 5.

The form that Mr. Guy signed does not pass constitutional muster. It neglected to inform Mr. Guy of his right of refusal. *Allridge*, 850 S.W.2d at 493. Mr. Guy had a well-established right to refuse a search of his home. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Where a consent to search form lacks the requisite notice of a right to refusal, the consent it purports to memorialize is more dubious.

Texas courts have evaluated consent to search forms that lack a right to refusal clause under the totality of the circumstances test. For example, in *Cooksey v. State*, officers illegally trampled into the defendant's backyard. *Cooksey v. State*, 350 S.W.3d 177, 188 (Tex. App.–San Antonio 2011). After their illegal entry, officers noticed marijuana plants placed on the defendant's back steps. *Id.* The defendant signed a consent to search form minutes later. *Id.* The consent to search form did not contain a right to refusal clause. *Id.* The court of appeals stated that two factors favored the state: (1) the officer did not go into the backyard intending to find illegal activity, and (2) he did not exhibit flagrant misconduct. *Cooksey*, 350 S.W.3d at 188. However, given the totality of the circumstances—including the wording of the form—defendant's consent was involuntary.

E. Both Mr. Guy and the defendant in *Cooksey* were victims of an illegal entry into their home, after which they both signed forms that lacked a right to refusal clause. An important contrast still remains: Mr. Guy's arrest and subsequent interrogation were striking displays of flagrant police misconduct, unlike the officers in *Cooksey*. Mr. Guy signed a constitutionally deficient consent to search form at the behest of KPD, within the context of implied promises and coercion. Not only did the arresting officers violate Mr. Guy's rights, they neglected his final constitutional safeguard—an adequate form. Given these issues alone, Mr. Guy did not voluntarily consent to search. However, the conduct of

the Killeen Police Department had yet another repercussion: a loathsome physical and mental impact on Mr. Guy that further undermined his consent. **Mr. Guy's Diminished Physical and Emotional Condition–a Consequence of Sleep Deprivation and the Trauma of the Assault on his Home, and the Excessive Force Used to Effect His Arrest—Militates in Favor of a Finding of Involuntariness**

Mr. Guy's lack of sleep, trauma, and increasing anxiety about Ms. Whittington and Officer Dinwiddie contributed to his poor physical condition. Prior to the arrest, Mr. Guy lacked sleep. After he was arrested, Mr. Guy was questioned and jailed. Mr. Guy had no time to calm down, retreat from his anxiety, or physically relax. Given his poor physical condition, particularly considered in combination with the other factors set forth above, Mr. Guy was in no condition to give his voluntary consent.

In *Miller v. State*, The Texas Court of Criminal Appeals addressed the physical condition of a defendant in relation to his consent. 736 S.W.2d 643, 650–51 (Tex. Crim. App. 1987). The defendant in Miller was also arrested at his home. *Id.* While the defendant was "in shock" he was neither medicated nor suffering from any other physical issue that would negate his consent. *Id.* Mr. Guy, on the other hand, had only 1.5 hours of sleep prior to his arrest. In addition to being "in shock" and mentally distressed, Mr. Guy was seriously sleep deprived.

Furthermore, unlike the defendant in *Miller*, Mr. Guy was subject to physical intimidation during his arrest. By sticking a gun in Guy's mouth, Obregon traumatized Mr. Guy and contributed to the deterioration of Mr. Guy's mental and physical condition. Mr. Guy's only break between the arrest and the consent to search was time spent in the Bell County Jail. At this time, Mr. Guy was under constant

worry of Ms. Whittington's condition and the possible destruction of his house. Mr. Guy's was in a constant state of anxiety.

Mr. Guy's mental and physical condition prevented him from legally consenting to a search. His anxiety and less than average intellectual functioning, rendered Mr. Guy more pliable and willing during detective questioning. When detectives put even a slight amount of pressure on Mr. Guy, his prior trauma colored his decision making. Mr. Guy gave a consent to search in the wake of physical abuse by Detective Obregon, the broken ribs and other injuries of Ms. Whittington, and uncertainty about the fate of Officer Dinwiddie. The overwhelming anxiety went unmitigated by proper police procedure. In fact, police constantly pressured Mr. Guy in violation of his *Miranda* rights. This chain of events created an anxious, unsure, and exhausted Mr. Guy. Subsequently, Mr. Guy gave involuntary consent to search his house.

F. The Statements Mr. Guy Made During His Interrogation Were the Product of Police Coercion and Excessive Force During Arrest, a Factor Militating in Favor of a Finding of Involuntariness.

In addition to other considerations, the statements made by Mr. Guy during his interrogation were clearly involuntary under Texas law and the United States Constitution. There is no relevant difference between consent to a search and consent to a statement that would warrant a finding that Mr. Guy's statements were involuntary but his consent to search was voluntary. Therefore, Mr. Guy's consent to search was also involuntary, and the evidence procured in the subsequent search must be suppressed.

When determining if a statement was given voluntarily, courts must ask whether the defendant's will was overborne by police coercion, and courts give relevance to the "length of detention, incommunicado or prolonged detention, denying a family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality." *Nenno v. State*, 970 S.W.2d 549, 557 (Tex. Crim. App. 1998), overruled on other grounds by *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999). The inquiry is not limited to police misconduct and reaches the subjective state of mind of the defendant, such that hallucinations, medications, and illness can render statements involuntary under Texas law. *Davis v. State*, 313 S.W.3d 317, 337 (Tex. Crim. App. 2010).

Almost all of the factors listed in *Nenno* support are present in Mr. Guy's case and support an inference that his will was overborne and his statements were involuntary. Police subjected Mr. Guy to physical brutality at his arrest; they questioned him for hours without his attorney present; they ignored numerous requests to be advised by counsel and to terminate questioning, and they continued to deny him access to an attorney over his objections throughout the entire interrogation. Although Shirley is not legally a family member of Mr. Guy, she was a very close companion, and Mr. Guy stated that he would do anything to keep her safe. Tr. 1 at 68. Police kept Mr. Guy separated from Shirley and intentionally exploited his concern for her in order to procure statements. The Court of Criminal Appeals has held that all of these circumstances are relevant and that they tend to show that consent was not voluntarily given. *Nenno*, 970 S.W.2d at 557. Thus, under

a totality of the circumstances analysis, the court must find that Mr. Guy's statements and his related consent to search were not given voluntarily.

Furthermore, even if this clear police misconduct was insufficient to render Mr. Guy's statements and consent to search involuntary, his mental state at the time rendered his consent involuntary. Texas law recognizes that the mental state of a suspect can render statements involuntary even in the absence of police misconduct. *Davis* 313 S.W.3d at 337. The record demonstrates that Mr. Guy was sleep deprived during his interrogation. Mere hours earlier, he had been awoken to the sound of his windows shattering and strange men rushing into his home. As he was emerging from his very brief and abruptly ended sleep, he was struck on the head, and he had the barrel of a gun shoved into his mouth. Exhibit 3 at 8. Under these circumstances, Mr. Guy's mental state should cast grave doubt on the voluntariness of his statements and consent to search. At the very least, the circumstances obligated officers to exercise special care in scrupulously ensuring that Mr. Guy was aware of his rights and honoring any invocation of those rights. Officers did not exercise such care and instead ignored Mr. Guy's objections and continued interrogating him in defiance of their constitutional duty not to.

The *Nenno* factors strongly support a finding that Mr. Guy's statements and consent to search were involuntary, and the circumstances of his arrest and interrogation provide further support for such a finding. Under Texas law, Mr. Guy's statements were not given voluntarily, so his consent to search, which was given in

the course of the same unconstitutional interrogation as his statements, must also have been involuntary. *Nenno* 970 S.W.2d at 557

In light of all these circumstances, the State cannot show by clear and convincing evidence that Mr. Guy voluntarily consented to the search of his apartment, and any evidence obtained pursuant to his coerced consent must be suppressed as the fruit of an unreasonable search. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

WHEREFORE, for the reasons set forth above and for any other reasons that may appear to the Court at a hearing on this motion, Mr. Guy requests that this motion be granted and that the Court suppress any evidence collected as the result of the unlawful search of his home and car.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been served on The Office of the District Attorney for Bell County by electronic service this 5th day of November 2018.

Respectfully submitted,

/S/Anthony L. Smith