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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD–0344–17

In the Court of Criminal Appeals
of the State of Texas

THE STATE OF TEXAS,
Appellant

v.

JOEL GARCIA
Appellee

On Appeal from Cause No. 20150D00100
Before the 210th District Court of El Paso County, Texas

APPELLEE'S PETITION FOR DISCRETIONARY REVIEW

T. BRENT MAYR
State Bar No: 24037052
Law Office of Brent Mayr, P.C.
5300 Memorial Dr., Suite 750
Houston, Texas 77007
Tel.: 713-808-9613
Fax: 713-808-9991
bmayr@bmayrlaw.com

RICHARD D. ESPER
State Bar No.: 06667500
Esper Law Office
801 N. El Paso St.
El Paso, TX 77002
Tel.: 915-544-3132
Fax: 915-544-4647
richardesperlaw@yahoo.com

ATTORNEYS FOR APPELLEE

IDENTIFICATION OF JUDGE, PARTIES, AND COUNSEL

The parties to the trial court's judgment are the State of Texas, Appellant, and Joel Garcia, Appellee.

The trial court judge was the Honorable Gonzalo Garcia, Presiding Judge for the 210th District Court of El Paso County, Texas.

Counsel for Appellant at trial were Assistant District Attorneys Denise Butterworth, Rebecca Tarango, and Amanda Enriquez and, on appeal, Lily Stroud on behalf of District Attorney Jaime Esparza, 34th Judicial District Attorney's Office, 500 E. San Antonio, Suite 201, El Paso, TX 79902.

Counsel for Appellee at the pre-trial hearings and on appeal was Miguel J. Cervantes, 1013 Montana Ave., El Paso, TX 79902, Ruth and Eunice Reyes, 4675 Montana Ave., Suite B, El Paso, TX 79903, and on appeal only, Michael Groves, 1012 Esplanada, El Paso, TX 79932.

Counsel for Appellee before this Court are T. Brent Mayr, 5300 Memorial Dr., Suite 750, Houston, TX 77007 and Richard D. Esper, 801 N. El Paso St., El Paso, TX 79902.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now JOEL GARCIA, Appellee in the court of appeals below and Petitioner before this Honorable Court, and respectfully moves this Court to grant discretionary review in this case pursuant to Texas Rule of Appellate Procedure 68.

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that oral argument would assist this Court in its decision process. This case involves the trial court's granting of Appellee's motion to suppress blood evidence. The trial court, after granting the motion in part, entered extensive oral findings of fact and conclusions of law. These findings are critical to the judgment in this case and oral argument would assist this Court in understanding the relevant facts.

STATEMENT OF THE CASE

Appellee was charged by indictment with three counts of intoxication manslaughter and one count of possession of a controlled substance.[1] Appellee filed a motion to suppress evidence, namely, blood evidence and the results of blood alcohol testing on the blood taken from Appellee at

[1] Clerk's Record, Vol. 1 (hereafter CR 1) at 8–11.

the order of police officers without a search warrant.[2] After a pre-trial hearing, the trial court granted the motion, entering extensive, oral findings of fact and conclusions of law.[3] The court of appeals, however, reversed the trial court's judgment, holding that exigent circumstances existed permitting the warrantless blood draw.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals, in an opinion joined by only two justices and handed down on February 24, 2017, reversed the trial court's judgment and ordered the case remanded to the trial court for further proceedings.[4] Appellee filed a motion for rehearing on March 10, 2017. On March 22, 2017, the court of appeals denied the motion without opinion.

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[2] CR 1 at 81–83.

[3] *See* Reporter's Record, Vol. 7 (hereafter [Vol. No.] RR) at 56, 95–109, 124; 8 RR 4, 9–15.

[4] *State v. Garcia*, No. 08–15–00264–CR, 2017 WL 728367 (Tex. App.—El Paso Feb. 24, 2017)(not designated for publication). Justice Hughes, the then-third justice for the court, did not participate in the case.

GROUNDS FOR REVIEW

1. The court of appeals erred by applying a *de novo* standard of review to the trial court's granting of Appellee's motion to suppress evidence, failing to give "almost total deference" to the trial court's findings of fact to support its conclusion that no exigent circumstances existed.

2. The court of appeals erred by considering evidence that did not become known to law enforcement until after the warrantless taking of Appellee's blood.

ARGUMENT

A. Relevant Facts and Trial Court's Findings

On December 24, 2014, Appellee was involved in a motor vehicle accident with another vehicle resulting in multiple fatalities.[5] Officer Andres Rodriguez came into contact with Appellee and believed he was intoxicated by alcohol based on his bloodshot eyes, slurred speed, and odor of alcohol.[6] This was consistent with Appellee's admission of having three or four beers.[7]

While Off. Rodriguez intended to subsequently transport Appellee to a local substation to perform field sobriety tests and continue his DWI

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[5] 2 RR 20–22; 3 RR 155–58.

[6] 3 RR 155, 159, 181.

[7] 3 RR 186, 198, 220.

investigation,[8] a decision was made by emergency personnel instead to transport Appellee to a nearby hospital for examination.[9] Officer Steven Torres accompanied Appellee as he went to the hospital while Off. Rodriguez, knowing that Appellee had already refused to provide a blood specimen, went to the local substation to begin the process of obtaining a search warrant to take Appellee's blood.[10]

Once at the hospital, while nurses were standing by ready to administer an I.V. to Appellee, according to the attending emergency room doctor, Dr. Gary Kavonian, Appellee was uncooperative and expressly told nurses that he did *not* want an I.V.[11] Accordingly, Dr. Kavonian ordered nurses that Appellee was not to receive any I.V. injection and no such injection was given.[12]

Nevertheless, an off-duty police officer, Raul Lom, who was present at the hospital working as a security officer, observed and learned of the

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[8] 3 RR 164–65.

[9] 2 RR 26–29, 24–35; 3 RR 164–65.

[10] 3 RR 73, 90–91, 166–67, 187.

[11] 2 RR 111, 113–14, 121–23.

[12] 2 RR 128–29.

investigation and decided to take matters into his own hands.[13] Although he knew Off. Rodriguez was back at the substation preparing to obtain a search warrant, he claimed that he was "very certain that any moment it could happen that [Appellee] would be injected with an I.V.," and, accordingly, ordered a nurse to take a blood sample from him.[14] Off. Torres, who was also present, offered a similar story, claiming that the blood was drawn under exigent circumstances.[15]

The trial court ultimately granted Appellee's motion to suppress the blood evidence, specifically rejecting the State's exigent circumstances argument. More notably, the trial court made an explicit finding that Officers Lom and Torres were *not* credible.[16] The trial court made this finding "based upon the testimony of all the witnesses, including the medical witnesses, especially the phlebotomist, that says that the determination that these Officers are trying to convince or put forth that there were exigent circumstances that blood was going to be drawn or that an I.V.

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[13] 2 RR 141–42, 148–52.

[14] 2 RR 152–159.

[15] 3 RR 139–45.

[16] 7 RR 15, 34, 38.

was about to occur, is not credible."[17] Throughout the trial court's findings of fact, it was unequivocal that it believed the testimony of the medical personnel[18] and disbelieved Officers Lom and Torres, especially in regards to the reasons they offered to justify the warrantless blood draw.[19]

On the issue of not getting a warrant, the trial court made this specific finding:

> They should have gotten it. They knew they should get a warrant. They were in the process of getting a warrant. They stopped the warrant process, which made no excuse because by the time that, what's his name, Rodriguez got to the hospital, they would have had the warrant. At 3:21, 3:22 they would have had the warrant.[20]

The Court continued,

> But what I'm saying is this, *the Court does not believe Officer Lom's assessment that there were exigent circumstances existing at the time* based upon the fact that the guy, a defendant, is laying down and he sees him shaking his head and the person with the I.V. is going like this. And that's it. There's no I.V. in her hand even. It's just a bag and he can't hear or see

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[17] 7 RR 51-52.

[18] 7 RR 14-15; 24, 31.

[19] 7 RR 15, 34, 38.

[20] 7 RR 50.

> what's going on. At that point he says, those are exigent circumstances, I call Rodriguez.... I'm entering a finding that they're not credible. Okay. That *the officer's testimony with regards to what formed the basis for the exigency in his mind, is not credible*."[21]

In conclusion, the trial court, once again emphasized its findings of fact by stating:

> Which again, leads the Court to believe, based upon the review of the evidence, that at the time that the blood was drawn, there was no exigency and therefore a warrant should have been — or could have had the warrant by that point in time. And even at that point, when he made that indication or indicated to the phlebotomist that they needed to get paperwork, even then they could have gotten a warrant because *at that point there was no blood draw, no I.V. even in question*. And so the Court again, finds the testimony of the phlebotomist credible. *It does not find the testimony of Officer Lom credible with regards to his determination in his mind that exigency existed to interfere*."[22]

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[21] 7 RR 51 (emphasis added).

[22] 7 RR 106 (emphasis added).

B. The Court of Appeals' Opinion

While the court of appeals rejected multiple arguments by the State to support their argument that exigent circumstances justified the warrantless blood draw, it concluded its opinion by considering Officers Lom and Torres' belief "that [Appellee] may have fluids suddenly injected into him."[23] In considering the issue, the court looked at two opinions from this Court, *Weems v. State*,[24] and *Cole v. State*.[25] The court's holding and reasoning came thereafter in the final paragraph of the opinion which is quoted here to emphasize the grounds for review:

> We therefore conclude that Garcia's circumstances are more akin to *Cole* than to *Weems*. Garcia's accident resulted in three deaths, several cars afire, and the necessity of numerous officers on the scene. *While his intoxication was induced by alcohol and cocaine metabolites* rather than by methamphetamines, the Higginbotham concern persists. *Introducing intravenous saline or other medication, particularly narcotic medication, would likely compromise the blood sample by impeding the ability to determine the rate of dissipation.* For these reasons, we sustain the State's sole point and reverse and remand for trial.[26]

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[23] *Garcia,* slip on. at 21.

[24] *Weems v. State*, 493 S.W.3d 574, 578 (Tex. Crim. App. 2016).

[25] *Cole v. State*, 490 S.W.3d 918, 921 (Tex. Crim. App. 2016).

[26] *Garcia*, slip op. at 26 (emphasis added).

While the court of appeals recognized the well-established rule that a reviewing court is to give "almost total deference to the historical facts found by the trial court,"[27] at no point in the entire opinion did the court of appeals even reference the fact that the trial court made extensive findings of facts and conclusions of law. More importantly, the court of appeals failed to consider the trial court's explicit finding that Officers Lom and Torres were *not* credible and the credible evidence established that medical personnel were *not* going to inject Appellee with an I.V.

Furthermore, the court of appeals also disregarded the trial court's finding that there was no credible evidence presented to support the inference that injecting Appellee with an I.V. would "compromise the blood sample."[28] A through and detailed review of the record confirms that there was no evidence presented in the record to support a finding that Appellee's intoxication was believed to be "induced by alcohol *and cocaine metabolites*" at the time of the warrantless search.

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[27] *Garcia*, slip op. at 11 (citing *State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015).

[28] 7 RR at 108. The trial court also reiterated this finding in its supplemental findings of fact made days later. 8 RR at 13–14.

C. The court of appeals failed to recognize and give weight to the trial court's findings that the officers were not credible and the credible evidence established that medical personnel were *not* going to administer an I.V. to Appellee.

Almost twenty years ago, this Honorable Court granted discretionary review to consider a court of appeals' application of the incorrect standard of review of a trial court's ruling on a motion to suppress in the seminal case, *Guzman v. State*.[29] While that opinion gave clear guidance about appellate courts giving "almost total deference to a trial court's determination of the historical facts," as well as "application of law to fact questions" or "mixed questions of law and fact" if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor,[30] this Court has had to, on multiple occasions, grant discretionary review in a number of other cases where courts of appeals continued to fail in following these clear rules.[31] Appellee's case is another one of these cases.

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[29] 955 S.W.2d 85 (Tex. Crim. App. 1997)

[30] *Id.* at 89.

[31] *See e.g. Montanez v. State*, 195 S.W.3d 101, 102 (Tex. Crim. App. 2006); *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007); *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Tucker v. State*, 369 S.W.3d 179, 184 (Tex. Crim. App. 2012)

The court of appeals' decision to reverse the trial court's granting of Appellee's motion to suppress was predicated on the fact that medical personnel were going to inject or introduce "saline or other medication" into Appellee.[32] The trial court, however, found from the evidence presented that this *never was going to happen*. Even more importantly, the trial court found that the officers' belief that Appellee was going to be injected with something was *not credible nor reliable*. The trial court did not just make the finding once, but twice, making the same finding when it reconvened days later to enter supplemental findings related to the motion to suppress.[33] Not only did the court of appeals fail to give any weight to this finding in their opinion, the court wholly failed to even mention it anywhere therein.

The court of appeals then reasoned that this injection of saline or other medication, (even though the trial court found that it was not going to happen) "would likely compromise the blood sample by impeding the

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[32] *Garcia*, slip op. at 26.

[33] 8 RR at 14–15.

ability to determine the rate of dissipation."[34] Again, this was entirely contrary to the trial court's finding based on the evidence presented.

The trial court found, "There's no evidence to indicate that. . . that, in and of itself, is speculative and of no value in the Court's determination as to what extent and to how diluted the blood would have been."[35] Indeed, if the injection of saline or other medication would "likely compromise the blood sample by impeding the ability to determine the rate of dissipation," then hundreds if not thousands of intoxicated driving convictions across this State are subject to question because those results were obtained from a hospital after presumably an I.V. was given to the suspect.[36] In short, the court of appeals disregarded not only the trial court's explicit factual finding, but common sense and regularly accepted scientific principles.

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[34] *Garcia*, slip op. at 26.

[35] 7 RR at 108; 8 RR at 13–14.

[36] *See e.g. State v. Hardy*, 963 S.W.2d 516, 518 (Tex. Crim. App. 1997); *Kirsch v. State*, 276 S.W.3d 579, 582 (Tex. App.—Houston [1st Dist.] 2008, *aff'd* 306 S.W.3d 738 (Tex. Crim. App. 2010).

This case does not just involve the application of the incorrect standard of review in a case, but does so in one involving exigent circumstances as a justification for warrantless blood draw, an area of the law that this Court has had to review on several occasions over the past few years.[37] There is little doubt that exigent circumstances should be used rarely as a justification for a warrantless intrusion into a person's body.[38] If trial courts, like the one here, are not given the required deference to determine whether the facts support the justification, law enforcement will only continue to act first and then excuse later. Worse, as this case establishes, anyone taken to a hospital, given just the *potential* of having substances injected to their body — despite how unreasonable and not credible that belief is — potentially faces having their blood drawn without a warrant.

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[37] *See e.g. State v. Villarreal*, 475 S.W.3d 784, 787 (Tex. Crim. App. 2014, rehr'g denied); *McGruder v. State*, 483 S.W.3d 880, 883 (Tex. Crim. App. 2016); *Weems*, 493 S.W.3d at 578; *Cole*, 490 S.W.3d at 921.

[38] *See Missouri v. McNeely*, __ U.S. __, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013)(quoting *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908)(1966)(noting that "the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'").

Accordingly, this Court should grant review as the court of appeals decided this important question of state and federal law in a way that conflicts with the applicable, foregoing decisions of this Court and the Supreme Court of the United States.[39] Furthermore, this Court should grant review as the court of appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise by this Court's power of supervision.[40]

D. The court of appeals wrongly considered evidence not available to law enforcement at the time of the warrantless blood draw.

In its one paragraph of reasoning for reversing the trial court's judgment that no exigent circumstances existed, the court of appeals also noted that there was a concern that Appellee's "intoxication was induced by alcohol *and cocaine metabolites*."[41] Accordingly, the court of appeals concluded that he was like the defendant in *Cole v. State*, who was believed to be intoxicated by methamphetamine and, therefore, "without a

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[39] *See* TEX. R. APP. P. 66.3(c).

[40] *See* TEX. R. APP. P. 66.3(f).

[41] *Garcia*, slip op. at 26.

known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know — unlike alcohol's widely accepted elimination rate — how much evidence it was losing as time passed."[42]

The problem with the court of appeals' analysis, however, is that the only evidence in the record showing that Appellee had consumed cocaine was the blood test results obtained well *after* the night of Appellee's arrest and the search.[43] While the presence of benzoylecgonine (cocaine metabolite) would tend to show that Appellee consumed cocaine at some undeterminable point in the past,[44] there was no evidence (1) that Appellee admitted to consuming cocaine at or before the time of the accident and (2) that anyone — law enforcement officers, civilian witnesses, emergency medical personnel or hospital staff — had any reason to believe or

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[42] *Cole*, 490 S.W.3d at 926–27.

[43] 3 RR 69.

[44] *See Manning v. State*, 114 S.W.3d 922, 924 (Tex. Crim. App. 2003)(discussing evidence of cocaine metabolization).

suspect that Appellee had consumed cocaine or was intoxicated by reason of the introduction of cocaine into his system.[45]

This is the critical distinguishing fact that the court of appeals failed to recognize when it concluded that this case was more like *Cole*. In *Cole*, this Court recognized, "An exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer *at the time of the search.*"[46] One of those facts in *Cole* that weighed in favor of concluding that exigent circumstances justified the warrantless blood draw was the fact that the appellant there admitted using "meth" and witnesses observed that appellant's behavior was consistent with methamphetamine intoxication.[47] Hence, this information was "available to the officer [there] at the time of the search" and, as part of the exigency analysis, the court could consider the fact that the officer believed appellant's body would continue to metabolize the methamphetamine and there would be no way to know the rate at which it would be

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[45] One simply need search the entire reporter's record for the word "cocaine" and no such word was uttered by a single witness.

[46] *Cole*, 490 S.W.3d at 923 (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)).

[47] *Id.* at 920, 926–27.

metabolized.[48] Such was not the case here. There was no evidence available to any witnesses in this case that Appellee was intoxicated on cocaine at the time of the search.

The greater problem with this holding is that it now sets a precedent whereby a court can consider something beyond what facts are available to an officer at the time of the search, even looking to evidence not discovered until months after that critical time as what occurred in this case.[49]

Accordingly, this Court should grant review as the court of appeals decided this important question of state and federal law in a way that conflicts with the applicable, foregoing decisions of this Court and the Supreme Court of the United States.[50]

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[48] *Id*. at 923.

[49] *See* State's Exhibit 15 at 9 RR 266.

[50] TEX. R. APP. P. 66.3(c).

PRAYER FOR RELIEF

WHEREFORE, Appellee prays that this Honorable Court grant his Petition for Discretionary Review, reverse the judgment of the court of appeals and, affirm the trial court's judgment granting Appellee's motion to suppress evidence.

Respectfully submitted,

/s/ T. Brent Mayr
T. BRENT MAYR
State Bar No: 24037052
5300 Memorial Dr., Suite 750.
Houston, Texas 77007
Tel.: 713-808-9613
Fax: 713-808-9991
E-mail: bmayr@bmayrlaw.com

/s/ Richard D. Esper
RICHARD D. ESPER
State Bar No.: 06667500
Esper Law Office
801 N. El Paso St.
El Paso, TX 77002
Tel.: 915-544-3132
Fax: 915-532-3455
richardesperlaw@yahoo.com

ATTORNEYS FOR JOEL GARCIA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served on to the attorney for the State, Lily Stroud, El Paso County District Attorney's Office, and on Stacey M. Soule, State Prosecuting Attorney, pursuant to Texas Rule of Appellate Procedure 9.5 (b)(1), through Appellee's counsel's electronic filing manager on June 20, 2017.

/s/ T. Brent Mayr
T. Brent Mayr
ATTORNEY FOR JOEL GARCIA

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(B) and 9.4(i)(3), undersigned counsel hereby certifies that this computer-generated document contains 2,950 words as calculated by the word count feature contained within the program used to prepare said document, namely, Microsoft Word 2016.

/s/ T. Brent Mayr
T. Brent Mayr
ATTORNEY FOR JOEL GARCIA

APPENDIX

[Court of Appeals' opinion begins on the next page]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-15-00264-CR
Appellant,	§	Appeal from
v.	§	210th District Court
JOEL GARCIA,	§	of El Paso County, Texas
Appellee.	§	(TC # 20150D00100)

O P I N I O N

This case arises out of a tragic car accident that occurred on or about December 24, 2014. Joel Garcia was indicted for three counts of intoxication manslaughter, in which he was alleged to have caused the deaths of Joshua Deal (Count I), Isaiah Deal (Count II), and Shannon Del Rio (Count III), and one count of possession of cocaine in an amount of less than one gram (Count IV). Garcia filed a pretrial motion to suppress the results of his blood alcohol test, asserting that his blood was drawn "without a search warrant, and without valid consent or other justification under the law." The trial court held several hearings and ultimately granted Garcia's motion to suppress, concluding that the blood taken from Garcia was procured without a warrant, and without any exigent circumstances excusing a warrant's absence. The State now appeals. For the reasons that follow, we reverse and remand.

FACTUAL SUMMARY

The Accident

On December 24, 2014, El Paso Police Officer Steven Torres arrived between 1:52 a.m. and 1:55 a.m. on the scene of a serious car accident at the intersection of Joe Battle Boulevard and Vista Del Sol Drive. Torres described the scene as "hectic" and "chaotic" and noted that one vehicle was completely engulfed in flames, while the other vehicle had flames coming from inside of the car. There were several bystanders, and Torres testified that his initial duties involved controlling the crowd, separating witnesses, and obtaining vehicle information. Officer Andres Rodriguez arrived at 1:52 a.m. and similarly described the scene as hectic -- officers were trying to control traffic, two cars were on fire, and people were walking around the entire area. Officer Gabaldon was walking with Garcia who was already in handcuffs and Gabaldon advised Rodriguez that Garcia was the driver. At that point in time, Rodriguez did not yet know who had caused the crash or exactly how many people were involved in the accident. Rodriguez described Garcia as having bloodshot eyes, slurred speech, and because he had a strong odor of alcohol about him, Rodriguez believed he was intoxicated. When Rodriguez asked Gabaldon why Garcia was handcuffed, Gabaldon indicated that Garcia might have tried to flee the scene. Rodriguez placed Garcia in the back of his patrol car and asked him what had happened. Garcia, who seemed dazed, told Rodriguez a story that did not make sense, but established that he was the driver of the Camaro. Later, Garcia told Rodriguez that he was not the driver. Officer Keisel confirmed that Garcia was indeed the driver, and relayed that officers thought he might have run a red light. A witness at the scene named Renteria said she saw another passenger exit the Camaro, and that Garcia was the driver. When Rodriguez confronted Garcia with this information from the eyewitness, Garcia again denied driving and even denied that there had

been an accident. Garcia admitted to Rodriguez that he "had about three or four beers or drinks . . . ." The dash-cam video recording of this discussion between Rodriguez and Garcia reflects that Rodriguez *Mirandized* Garcia at approximately 2:20 a.m. Rodriguez initially intended to take Garcia to the Pebble Hills Regional Command for further questioning, but by this time, EMS approached his patrol car and indicated that Garcia would be transported to Del Sol Medical Center due to the nature and severity of the accident. Because Garcia already refused to provide a blood specimen at the scene, Rodriguez knew he needed a search warrant to obtain Garcia's blood. Officers selected Torres to ride with Garcia to the hospital. Torres informed Rodriguez that he had never requested a blood draw before, so Rodriguez told him he would meet him at the hospital after he procured a search warrant. Rodriguez further explained that because of his training and experience as a DWI and drug recognition officer and studying what types of drugs might affect blood alcohol concentration (BAC), intravenous (IV) solution dilutes BAC and that some medications could either increase or decrease BAC. Consequently, Rodriguez told Torres to observe Garcia closely and notify him if hospital personnel administered any IV solutions or medications to Garcia. Rodriguez then left the scene at 2:40 a.m. to begin drafting a search warrant. Telephone records indicated Rodriguez called Officer Wilkinson at 2:40 a.m. and again at 2:46 a.m. because he wanted help with the warrant, but Officer Wilkinson was assisting with another arrest. It took Rodriguez ten to twelve minutes to reach the command station. He acknowledged that Pebble Hills was not the closest station, but he chose it because of its proximity to the hospital. Rodriguez arrived at 2:53 a.m. and verified Garcia's identification. He learned that one of the victims had already died in transit to the hospital, and that there were two other passengers in the vehicle that Garcia allegedly struck. He had no information on the passenger riding with Garcia in the Camaro. He called his sergeant

and Officer Candia for more information on the involved vehicles, the passenger who died in transit, and any possible witnesses. Rodriguez then attempted to write out sufficient facts, based on his own recollection along with information from other investigating officers, to satisfy the requirements that probable cause existed so that a magistrate would sign both an arrest and search warrant for Garcia. He had not yet ascertained which magistrate was on duty. Rodriguez was familiar with the requirements for a blood draw and the procedure for obtaining a search warrant from the magistrate. At the time of the accident, Rodriguez had already prepared between fifty and sixty search warrants, mostly for routine DWIs. Rodriguez described the general process of preparing a search warrant, and explained that it routinely took him anywhere from thirty to forty-five minutes to draft one. He usually prepared an arrest warrant to accompany the search warrant because the magistrate judges required him to do so. After drafting a warrant, Rodriguez would take it downtown where the magistrates were located, and would try to expedite the process by informing the on-call magistrate that he needed a warrant. According to Rodriguez, El Paso County did not have any procedures in place that allowed a warrant to be sent by fax or email. While warrants could be obtained by phone, Rodriguez did not believe any of the magistrates would recognize his voice. He estimated that the process of having a magistrate review and sign a warrant took approximately twenty to thirty minutes. The trial court then elicited testimony from Rodriguez indicating that at the time he arrived at the police station, he possessed facts routinely used for blood draw search warrants for simple DWI cases. Rodriguez revealed that Garcia was already in their system because of a previous DWI arrest. El Paso Fire Department paramedic Jose Luis Cavazos was also dispatched to the intersection of Joe Battle and Vista Del Sol. He arrived at 2:32 a.m. where he observed several other units already at the scene. Cavazos was directed to examine Garcia, who was already

handcuffed in a police car. Cavazos noticed that Garcia seemed dazed, his eyes were bloodshot and Cavazos also detected a strong smell of alcohol on his breath. Adrian Palomo, a then-paramedic student, accompanied Cavazos. Garcia's only complaint was that he felt pain in his right foot. Garcia told Cavazos he had consumed a couple of beers and denied that he was the driver of the vehicle. While Cavazos did not see any obvious life-threatening injuries during his initial external examination of Garcia, he ordinarily exercised precaution and assumed that a patient may also have internal injuries that would not be revealed until further diagnostic testing at a hospital. When Garcia told Cavazos that he wanted to be transported to the hospital, Cavazos and Palomo placed him on a stretcher with a C-collar around his neck to immobilize him and prevent further injury. Because of the severity of the crash, the extensive damage to the vehicles, and the potential for Garcia to have sustained life-threatening injuries, he was classified as a Level II trauma patient such that paramedics were required to transport him to a hospital with a trauma center. Level II trauma patients also typically receive advanced life support care on the way to the hospital, including an IV, an EKG, and possibly medication if the patient suffers from pain so severe that it compromises his vital signs. Cavazos, Palomo, and Torres left for the trauma center at Del Sol Medical Center at approximately 2:46 a.m. During transit, Garcia refused to allow Palomo to treat him with an IV or cardiac monitor, but permitted him to take his vital signs, including his pulse and blood pressure, and perform a general head-to-toe assessment for injuries.

The Hospital

At 3:06 a.m., Garcia was admitted to the emergency room at Del Sol for treatment. Elsie Andrade was one of the nurses on the trauma team. She confirmed that the hospital received Garcia as a Level II trauma patient, and recalled Garcia "babbling" about his Camaro when he

arrived, and stating that he said he had done nothing wrong. Andrade explained that once the hospital receives a Level II trauma patient, the process moves very quickly. While a patient is moved onto a bed, the emergency medicine physician assesses the patient and medical personnel connect the patient to machines to monitor vital signs.

When Garcia entered the ER, Andrade was already near the curtain by his bed, waiting with the equipment to begin the IV process. Specifically, she had a metal tray which included an Angiocath (the needle used to administer the IV), a saline lock (a piece of tubing attached to the Angiocath), a saline flush, tubing for the blood, Tegaderm tape, and a tourniquet. Andrade was aware that there were several officers nearby. She did not know whether the officers could hear her, but she knew that her actions were visible to them.

When asked how close she came to administering the IV to Garcia, Andrade responded:

> [Andrade]: I did get close. I started to, you know, look through the arm to see where I could start the I.V.
>
> [State]: Are you holding--can you describe that for us? Are you holding his arm?
>
> [Andrade]: Yes.
>
> [State]: Okay.
>
> [Andrade]: I touch certain areas to see where I could feel a vein, see where I could start an I.V. And then during that time I was told that only scans were going to be done, an I.V. wasn't needed or blood wasn't going to be needed either, so I stopped and I didn't start the I.V.

Andrade did not relay this information to the nearby police officers.

On cross-examination, Andrade acknowledged that the administration of an IV was a routine procedure in the ER. The purpose of administering a saline solution was to replenish volume. In Garcia's case, Andrade had only planned on administering a saline flush. "I was there where I was going to start the IV, but I never actually did start it." On re-direct, Andrade

also explained that an IV may be used to administer medications, other fluids, and even blood transfusions.

Upon the trial court's examination, Andrade mentioned that the nearby officers were standing approximately ten to twelve feet away from Garcia's cubicle and that the curtain around his bed was not drawn. When the trial court asked Andrade whether the officers were capable of seeing what was being done to Garcia, the following exchange occurred:

> [Trial Court]: They were seeing everything that was being done?
>
> [Andrade]: They could possibly be seeing.
>
> [Trial Court]: From where they were at, based upon what you were able to see, they were able to see what you guys were doing?
>
> [Andrade]: Uh-huh.
>
> [Trial Court]: You could see them?
>
> [Andrade]: Yeah.

Andrade indicated that Garcia had been in the ER for approximately five to ten minutes when she was told not to administer an IV. Because Garcia no longer needed an IV, she left.

Dr. Gary Kavonian, an emergency medicine physician at Del Sol, treated Garcia when he arrived at the hospital. Kavonian recalled Garcia as being uncooperative, and opined that he did not appear to be acting in the best interest of his health by resisting certain treatments. Kavonian smelled alcohol on Garcia's person. According to Kavonian, ER nurses routinely administer IVs while he assesses the trauma patient's condition. He recalled that nurses were standing to the right of Garcia, ready to proceed with an IV bag and equipment on a stainless steel stand, but Garcia did not want an IV administered. Because Garcia was so uncooperative, Kavonian advised the staff not to begin the IV at that time.

Kavonian testified about the IV process generally. He explained that fluids, pain medications, and sedatives could all be administered via IV. Counsel asked if any of these could compromise a patient's BAC, and Kavonian responded that saline solution could possibly dilute any solute in the blood and agreed that it would dilute a person's BAC.

Because Garcia complained of foot pain, and had some bruising on his head, Kavonian also ordered a computed tomography scan of Garcia's brain and cervical spine, as well as x-rays of his chest, pelvis, and right ankle. Garcia's medical records reflect that Kavonian ordered the CT scans at 3:18 a.m. and they were taken ten minutes later.

On cross-examination, defense counsel suggested that an untrained person could have assumed from the IV equipment that the nurse was simply going to perform a routine blood draw, but Kavonian clarified that a blood draw would not actually require the insertion of intravenous tubing because the sole purpose of administering an IV is to provide fluids to the patient. Kavonian agreed that if an untrained individual observed an IV bag, he may assume that an IV is about to be administered.

Police Officer Raul Lom testified that he had been a police officer from 1978 until his retirement in 2015. On the morning of the accident, Lom was working in an off-duty capacity providing security at Del Sol. As a police officer, Lom was assigned to the DWI task force unit and indicated that he conducted an average of twenty-five DWI investigations per month over the span of thirty years. Lom remembered when Garcia was admitted to the ER because he escorted Garcia and the medical team through the hospital, ensuring the aisles were kept clear. Lom stood approximately ten feet away from Garcia's cubicle and, due to distance and noise, he was unable to hear any conversations between Garcia and the nurses. He did see the nurse with an IV bag in her hand and saw Garcia subsequently shake his head "no." Lom became

concerned, and explained that based on the years working off-duty security at the hospital, he knew that the bag of fluid in the nurse's hand was an IV bag. Lom did not know exactly what type of substance was inside the bag and admitted that he never saw the nurse swabbing Garcia's arm, or preparing the arm to insert the needle. Lom had already spoken with Officer Candia, who informed him about the car accident. Candia told Lom that they were in the process of obtaining a search warrant for Garcia's blood. Because the officers at the hospital were unsure as to whether anyone had administered the DIC-24, *Miranda* warnings, or conducted any standard field sobriety tests, Lom called Rodriguez who assured him that Garcia had already been properly admonished and that he was currently in the process of preparing the warrant.

Concerned, Lom relayed to Rodriguez that administration of an IV was imminent. But he failed to inquire of any medical personnel whether Garcia was actually going to receive an IV. Lom knew that once Rodriguez finished preparing the search warrant, he still needed to drive downtown to locate a magistrate to sign the warrant, which would take around fifteen minutes, and then drive back to the hospital with the warrant, which he estimated would take another ten minutes. Lom also admitted that Rodriguez did not actually need to drive back to the hospital with the signed warrant because he could inform the officers at the hospital by cell phone that the warrant had been signed. Lom was also unsure whether Rodriguez would be able to locate the magistrate because it was Christmas Eve and the on-duty magistrate sometimes took his lunch break between 3 and 4 a.m.

Lom and Rodriguez then decided to perform the warrantless blood draw because Lom was "very certain that any moment it could happen that [Garcia] would be injected with an I.V." Lom directed Torres to obtain a sample and Torres then had the phlebotomist, Adriana Gandara, draw the blood. Lom was aware that mandatory blood draws were no longer performed in

Texas, but Garcia's blood was not drawn pursuant to the mandatory blood draw statute, but rather, based on exigent circumstances. While he did not actually know if IV fluids would dilute Garcia's BAC, he was still concerned the issue may arise in court. Lom further explained that if a suspect was being medically treated, "there's no power in the face of the earth" that permitted an officer to instruct medical personnel to cease treatment until the officer obtained a search warrant. After the officers obtained Garcia's blood, Lom resumed his duties at the hospital, including monitoring parking lots, the floors, and the front area of the hospital.

Torres described the ER at Del Sol as crowded and hectic when he arrived with EMS and Garcia. While he stood approximately five to ten feet away from Garcia, he saw medical personnel removing Garcia's clothes, connecting him to monitors, and examining him. He noticed a nurse organizing a "prep table" that contained an IV bag and tubing and thought she was preparing to administer an IV. He attempted to ask medical personnel about Garcia's treatment but was unsuccessful because they were preoccupied. While Torres was trying to find out more information, Lom approached him and asked if he needed assistance.

Torres told Lom that he did not have a blood kit with him. Lom then contacted Rodriguez at 3:10 a.m. to determine the status of the search warrant, indicating that the administration of an IV or medication was imminent. Rodriguez, through Lom, directed Torres to perform the blood draw. The phlebotomist drew Garcia's blood at 3:17 a.m. The lab reports revealed that Garcia had a BAC of .268 and tested positive for cocaine metabolites.

Like Lom, Torres was also aware that he needed a search warrant for a nonconsensual, warrantless blood draw, unless immediate action became necessary under exigent circumstances. Torres similarly testified on cross-examination, that he believed exigent circumstances existed when he observed what he thought to be the imminent administration of the IV bag.

At approximately 4:30 a.m., Rodriguez learned that Garcia's scans revealed no serious injuries. Garcia was released into Rodriguez's custody at 4:45 a.m., and Rodriguez transported Garcia to the police station. Ultimately, Rodriguez was unable to produce the warrant he originally started.

MOTION TO SUPPRESS

In its sole issue presented for our review, the State contends that the trial erred in granting Garcia's motion to suppress the blood analysis results because Garcia's warrantless blood draw was justified under the exigency exception to the Fourth Amendment warrant requirement.

Standard of Review

We review a trial court's ruling on a motion to suppress for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex.Crim.App. 2013). Under that standard, the record is "viewed in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Story*, 445 S.W.3d 729, 732 (Tex.Crim.App. 2014), *quoting State v. Dixon*, 206 S.W.3d 587, 590 (Tex.Crim.App. 2006).

Moreover, we apply "a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing *de novo* the trial court's application of the law." *State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex.Crim.App. 2015); *see Arguellez*, 409 S.W.3d at 662 (explaining that appellate courts afford "almost complete deference . . . to [a trial court's] determination of historical facts, especially if those are based on an assessment of credibility and demeanor"). The trial judge is the sole trier of fact as to the credibility and weight to give witness testimony at a suppression hearing. *St. George v. State*, 237 S.W.3d 720, 725 (Tex.Crim.App. 2007). As such, the trial judge may choose to accept or reject any or all of the

testimony offered. *Amador v. State*, 221 S.W.3d 666, 673 (Tex.Crim.App. 2007); *Gaines v. State*, 888 S.W.2d 504, 507-08 (Tex.App.--El Paso 1994, no pet.). We do not engage in our own factual review of the trial court's decision. *Garcia v. State*, 15 S.W.3d 533, 535 (Tex.Crim.App. 2000).

"The same deference is afforded the trial court with respect to its ruling on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App. 2010). We also review "a trial court's application of the law of search and seizure to the facts *de novo*." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex.Crim.App. 2010), including whether a warrantless search was justified by the presence of exigent circumstances. *Roop v. State*, 484 S.W.3d 594 (Tex.App.--Austin 2016, pet. ref'd); *see Evans v. State*, No. 14-13-00642-CR, 2015 WL 545702, at *6 (Tex.App.--Houston [14th Dist.] Feb. 10, 2015, pet. ref'd)(mem.op., not designated for publication)(providing that "[a]lthough all findings of historical fact supported by the record must be implied in favor of the trial court's ruling that the blood draw should not be suppressed, whether those facts meet the legal standard of exigent circumstances is a legal question that we review de novo"). Further, we view the evidence in the light most favorable to the trial court's ruling on the motion, *State v. Robinson*, 334 S.W.3d 776, 778 (Tex.Crim.App. 2011), and the trial court's ruling will be upheld if it is correct under any theory of law regardless of whether the trial court based its ruling on that theory. *Story*, 445 S.W.3d at 732.

Applicable Law

The drawing of a person's blood constitutes a search under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 769, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966).

Accordingly, a blood draw generally requires a search warrant, unless a "recognized exception" to the warrant requirement applies. *See Missouri v. McNeely*, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013). "'One well-recognized exception,' and the one at issue in this case, 'applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.'" *Id.*, *quoting Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011). One such exigent circumstance is preventing the destruction of evidence or contraband. *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex.Crim.App. 2007), c*iting McNairy v. State*, 835 S.W.2d 101, 107 (Tex.Crim.App. 1991). In DWI cases, the evidence that is at risk of destruction is a suspect's blood alcohol content, which "begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber*, 384 U.S. at 770, 86 S.Ct. at 1836. As such, the Supreme Court has held that the warrantless collection of blood from a DWI suspect does not violate the Fourth Amendment in cases when the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.*, *quoting Preston v. United States*, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964).

More recently, however, the Supreme Court clarified its holding in *Schmerber*, rejecting the argument that "the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *McNeely*, 133 S.Ct. at 1556. Instead, exigency in this context must still be determined on a case-by-case basis, evaluating the totality of the circumstances. *Id.* Although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency

justifying a properly conducted warrantless blood test," in other cases, "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.*; *see also McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948)("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative."). This is because it is inevitable that there is "some delay between the time of the arrest or accident and the time of the test" regardless of whether police officers are required to obtain a warrant. *McNeely*, 133 S.Ct. at 1561. If, under the circumstances of the case, "the warrant process will not significantly increase the delay before the blood test is conducted," there can be "no plausible justification for an exception to the warrant requirement." *Id.*

As with other warrantless searches, the State bears the burden to prove that the warrantless blood draw was reasonable under the totality of the circumstances. *See Amador v. State*, 221 S.W.3d 666, 672-73 (Tex.Crim.App. 2007); *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Crim.App. 2005). "We apply an objective standard of reasonableness in determining whether a warrantless search is justified, and take into account the facts and circumstances known to the police at the time of the search. *Colburn v. State*, 966 S.W.2d 511, 519 (Tex.Crim.App. 1998); *State v. Anderson*, 445 S.W.3d 895, 910 (Tex.App.--Beaumont 2014, no pet.).

Analysis

In its brief, the State asserts the following factors to support its contention that exigent circumstances justified Garcia's warrantless blood draw: (1) the delay necessary to control and

investigate the crash scene and the gravity of the offense; (2) the delay caused by Garcia's actions, including his attempts to thwart the investigation; (3) exigencies created by Garcia's request to be taken to the hospital; (4) the unavailability of an expedited warrant process in El Paso County and (5) the officers' inability to obtain a warrant without significantly undermining the efficacy of the search.

Delay necessary to control and investigate crash scene and the gravity of the offense

The State first argues that both the delay that arose from the necessity to control and investigate the scene and the gravity of the offense contributed to the creation of exigent circumstances that justified the officers' warrantless blood draw. To ensure that the exigencies of the situation make dispensing with the constitutional requirement of a warrant "imperative," courts must focus on whether the State showed that police could not reasonably obtain a warrant, not on whether it showed how severe the accident was. *Cole v. State*, 454 S.W.3d 89, 100 (Tex.App.--Texarkana 2014, pet. granted). The court of appeals in *Cole* explained how this distinction is not merely a semantic one:

> [T]he difference between the delay attendant to investigating an accident and addressing injuries and the delay necessary to obtain a warrant can be substantial depending on the facts of a particular case. Even if an officer's investigation of a 'serious' accident lasts for an hour, the availability of another officer 15 minutes into the investigation, or the presence of medical personnel to treat injuries, could significantly reduce the delay necessary to obtain a warrant. Alternatively, if a lone officer discovers an apparently intoxicated driving during a midnight traffic stop not involving any accident, the delay necessary to obtain a warrant could be substantial if there is no magistrate available.

Id. at 100-01, *citing Douds v. State*, 434 S.W.3d 842, 853-54 (Tex.App.--Houston [14th Dist.] 2014, pet. granted). We do not consider the gravity of the offense when focusing on our exigent circumstances analysis. *See Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 2414, 57 L.Ed.2d 290 (1978)(declining to hold that the seriousness of the offense under investigation itself

creates exigent circumstances of the kind that justifies a warrantless search under the Fourth Amendment); *Cole*, 454 S.W.3d at 103 (explaining that a court should neither be grading the severity of an accident nor focusing its analysis on the delay attendant to an investigation and reiterating that as in *McNeely* and *Schmerber*, our exigent circumstances analysis should focus on the delay attendant to obtaining a warrant, i.e., whether the State showed that, under the circumstances, the police could not reasonably obtain a warrant); *see also McNeely*, 133 S.Ct. at 1561; *Schmerber*, 384 U.S. at 770, 86 S.Ct. 1835; *Turrubiate v. State*, 399 S.W.3d 147, 153 n.4 (Tex.Crim.App. 2013), *citing United States v. Menchaca-Castruita*, 587 F.3d 283, 295-96 (5th Cir. 2009)(a finding of exigent circumstances "must be based on an officer's reasonable belief that *the delay necessary to obtain a warrant* will facilitate the destruction or removal of evidence . . . ." (emphasis added)); *Evans v. State*, No. 14-13-00642-CR, 2015 WL 545702, at *6 (Tex.App.--Houston [14th Dist.] Feb. 10, 2015, pet. ref'd)(declining to focus on the severity of the accident because doing so would lead inevitably to inconsistent outcomes). Additionally, as Garcia correctly points out, even if we were to consider the seriousness of the offense with which he was charged, at that point in time, Garcia had only been arrested for a DWI, not intoxication manslaughter.

Moreover, the record reflects that when Rodriguez arrived at the scene at approximately 1:52 a.m., several other law enforcement officers, including Torres and Gabaldon, had already arrived and were controlling bystanders and investigating along with medical personnel and the fire department. While Rodriguez's initial duties included conducting a preliminary investigation, he was not alone in his efforts. In *Pearson v. State*, No. 13-11-00137-CR, 2014 WL 895509, at *3 (Tex.App.--Corpus Christi Mar. 6, 2014, pet. ref'd)(mem. op., not designated for publication), the court concluded that exigent circumstances justified a warrantless blood

draw where the officer was the *only* officer on duty that morning solely responsible for securing the scene, preserving, and collecting evidence, resulting in a six hour delay between the time of the accident and the time the officer arrived at the hospital and drew defendant's blood. Clearly, we cannot equate Rodriguez's situation with that of the officer in *Pearson*. At most, Rodriguez was delayed an hour, from the time he arrived at the scene 1:52 a.m., to the time he left the scene at 2:40 a.m. to begin drafting the search warrant.

The court in *State v. Anderson* similarly discussed the availability of several officers to assist with obtaining a search warrant for Anderson's blood. 445 S.W.3d 895, 911 (Tex.App.--Beaumont 2014, no pet.). While one officer remained with Anderson at the hospital, one or more of the other officers present at the scene of the accident, with the assistance of the assistant district attorneys, could have taken steps to secure a warrant for a blood draw. *Id.* at 911; *see also McNeely*, 133 S.Ct. at 1561 (noting that no warrant exception applies when "between the time of the arrest or accident and time of the test," an officer other than the one handling the suspect "can take steps to secure a warrant"); *see also State v. Martinez*, No. 03-14-00588-CR, 2016 WL 1317984, at *3 (Tex.App.--Austin Mar. 30, 2016, pet. ref'd)(not designated for publication). The record in this case is clear that Torres rode with Garcia to the hospital while Rodriguez initiated the warrant process. It is also apparent that several other officers remained at the scene and arrived later at the hospital to assist with the investigation.

The State further relies on *Garcia v. State*, No. 14-14-00387-CR, 2015 WL 2250895, at *1 (Tex.App.--Houston [14th Dist.] May 12, 2015, pet. ref'd)(not designated for publication), which held exigent circumstances justified a police officer's warrantless blood draw. However, *Garcia* is distinguishable for several reasons. Transportation from the scene to the hospital was significantly delayed because an arriving helicopter prevented incoming and outgoing traffic

from leaving; probable cause was not developed until after the appellant was taken to the hospital; and there was not an available magistrate in the entire county. *Id.* at *7-8. Here, there was no helicopter blocking transport, probable cause was developed at the scene shortly after arrival, and the record reflects that a magistrate was on call that morning to review the warrant. Accordingly, we cannot agree with the State that the delay in investigating and controlling the accident scene or the severity of the accident contributed in creating an exigency.

Garcia's efforts to thwart the investigation

The State next contends that the delay caused by Garcia's actions, including his attempts to thwart the investigation with his claims that he was not driving, contributed to the exigent circumstances that justified Garcia's warrantless blood draw.

In *Roop v. State*, 484 S.W.3d 594 (Tex.App.--Austin 2016, pet. ref'd), the State similarly argued that the totality of the circumstances constituted exigency sufficient to justify the warrantless blood draw. It compared *Roop* to *Schmerber* in that both cases involved a traffic accident. *Id.* *Roop* involved a car crash with multiple occupants and witnesses; two individuals were transported to a medical facility for treatment; and more than an hour elapsed from the time the officer arrived on the scene to the time he arrived with Roop at the jail. *Id.* The court of appeals distinguished the facts from those in *Schmerber*. *Id.* It concluded that although Roop was involved in a traffic accident, nothing in the record suggested that this fact significantly delayed the collection of his blood. *Id.* The officer testified that he came into contact with Roop at about 4 a.m., placed Roop under arrest at 4:25, and ordered her blood to be drawn at 5:09. *Id.* The officer stopped to allow Roop to use the restroom, which took only a few minutes, and the drive to the jail took only seven to eight minutes. *Id.* The court was not persuaded that the mere existence of a traffic accident constituted a *per se* exigency justifying a warrantless blood draw.

Id.; *see also Evans*, 2015 WL 545702, at *6 (holding that accident investigation, by itself, is not exigent circumstance).

Nor are we persuaded that Garcia's denial that he was the driver significantly delayed Rodriguez's ability to collect blood. Rodriguez arrived at the scene around 1:52 a.m. and initially focused his attention on a preliminary investigation. He left at 2:40 a.m., to begin procuring the search warrant and arrived at Del Sol about ninety minutes later. Garcia's attempts to convince Rodriguez that he was not the driver took a minimal amount of time, at best.

Unavailability of expedited warrant process

The State contends that the trial court improperly relied on technological advances that El Paso County does not have in place to deal with the expediency of procuring warrants. Pursuant to *McNeely,* the relevant factors in determining whether a warrantless search is reasonable include "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence." *McNeely,* 133 S.Ct. at 1568; *see also Bowman v. State*, No. 05-13-01349-CR, 2015 WL 557205, at *11 (Tex.App.--Dallas Feb. 10, 2015, no pet.). That factor "will no doubt vary depending upon the circumstances in the case." *Id.* "[I]n order to establish a plausible justification for an exigent circumstances exception to the warrant requirement, the State ha[s] the burden to show facts and circumstances beyond the passage of time and the resulting dissipation of alcohol in the bloodstream." *Douds,* 434 S.W.3d at 851.

Additionally, the *McNeely* court noted that technological developments enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion. *Id.* at 1562-563 (citing various state statutes that allow police to use technology-based developments to "streamline the warrant process"); *see also Clay v. State,* 391 S.W.3d 94, 103-04 (Tex.Crim.App.2013)(holding that "no

compelling reasoning" contemplated in the search warrant statute requires that the oath always be administered in the corporal presence of the magistrate, so long as sufficient care is taken in the individual case to preserve the same or equivalent solemnizing function to that which corporal presence accomplishes).

Rodriguez testified that El Paso County warrant procedures permitted officers to obtain a warrant over the phone. Even though it was Christmas Eve, there was a magistrate on-duty and there is no evidence to suggest that the magistrate was unavailable; only that Lom thought that the magistrate might have taken his lunch break sometime between 3 and 4 a.m. *See McNeil v. State*, 443 S.W.3d 295, 302 (Tex.App.--San Antonio 2014, pet. ref'd)(declining to find exigency even where a magistrate was not "on-call" for purposes of obtaining a warrant); *Anderson*, 445 S.W.3d at 911 (evidence at suppression hearing indicated that there was a judge available and on stand-by and that there were other officers on the scene able to assist with the warrant); *Chidyausiku v. State*, 457 S.W.3d 627, 631 (Tex.App.--Fort Worth 2015, pet. ref'd)(record established that Arlington Police Department established a protocol and procedure to obtain search warrants efficiently and without undue delay; and judge was available twenty-four hours a day, seven days a week, holidays included).

Even if Rodriguez had waited the maximum estimated time to obtain a warrant, according to our calculations, he would have had one shortly after 4 a.m. This is slightly more than two hours from the time officers arrived at the scene of the accident and well before the hospital discharged Garcia into Rodriguez's custody at 4:45 a.m. *See Gore v. State*, 451 S.W.3d 182, 197-98 (Tex.App.--Houston [1st Dist.] 2014, pet. ref'd).

Request to go to hospital

The State emphasizes Garcia's request to be taken to the hospital as an additional circumstance supporting the reasonableness of the officers' decision to draw Garcia's blood without a warrant. First, the record plainly reveals that Garcia was going to Del Sol regardless of whether he asked to be transported. Cavazos testified that due to the mechanism of the injury, Garcia was classified as a Level II trauma patient such that paramedics were required to transport him to a hospital with a trauma center.

Moreover, the context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "now or never" situation. *McNeely,* 133 S.Ct. at 1561. The *McNeely* court noted that blood alcohol evidence from a drunk-driving suspect "naturally dissipates over time in a gradual and relatively predictable manner," rather than in "circumstances in which the suspect has control over easily disposable evidence." *Id.* Additionally, the time expended by a police officer to transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test creates an inevitable delay between the time of the arrest or accident and the time of the test, regardless of whether the police officers are required to obtain a warrant. *Id.*

Here, the State attempts to distinguish the officers' beliefs that Garcia may have fluids suddenly injected into him, from *McNeely*'s notion that blood alcohol evidence from a drunk-driving suspect dissipates gradually and in a predictable manner. *McNeely*, 133 S.Ct. at 1561. In doing so, the State tries to categorize this situation that the officers were confronted with, as a truly "now or never" scenario that we more often see in non-DWI Fourth Amendment search warrant cases. And thus we come to the crux of the case. Two recent decisions by the Texas

Court of Criminal Appeals guide our analysis. Both opinions were written by Judge Keasler and issued on May 25, 2016.

Weems v. State

In *Weems v. State*, 493 S.W.3d 574 (Tex.Crim.App. 2016), the defendant moved to suppress the results of a warrantless blood draw. The trial court denied the motion but the court of appeals reversed, holding that the State failed to establish that the blood draw was justified by exigent circumstances. Weems and a friend were returning home from a bar where they had been drinking. Weems' car veered off the road, flipped over and struck a utility pole. The driver of a passing car saw Weems climb out of the car through the driver's side window. He was stumbling and when asked whether he was alright or if he were drunk, he answered that he was drunk. He then fled on foot. The passenger appeared "beat up pretty bad" and a strong odor of alcohol emanated from the car. The passerby called 911. Sheriff's Deputy Munoz responded to the call and the passerby pointed to a parked car and told him someone was underneath it. Munoz saw an injured man who matched the description of the driver. Munoz detained Weems at 12:17 a.m. and noticed his bloodshot eyes, slurred speech, and bloodied face. Weems refused to give a breath or blood sample. He was treated at the scene by EMS but because he complained of back and neck pain, he was taken to University Hospital where he was placed in the trauma unit. An officer requested a blood draw, but the blood was taken over two hours after his arrest. Blood alcohol concentration was .18, above the .08 definition of intoxication.

The Court of Criminal Appeals granted petition for discretionary review of the court of appeals decision that Texas' implied consent and mandatory blood draw schemes do not support a warrantless draw under the exigency exception. It recounted the holding of *Schmerber v. California*, 384 U.S. 757, 770-72 (1966) that, based on the circumstances surrounding the search,

a warrantless seizure of a driver's blood was reasonable where (1) the officer had probable cause that the driver operated a vehicle while intoxicated; (2) alcohol naturally dissipated after drinking stops; (3) the time necessary to investigate the accident scene and transport the driver to a hospital impacted the time to obtain a warrant; (4) the means of determining whether an individual is intoxicated are highly effective; (5) venipuncture is a common procedure with little risk; and (6) the test is performed in a reasonable manner.

The court then tracked *Missouri v. McNeely*, as necessary to resolve a split of authority after *Schmerber* "as to whether the body's natural metabolization of alcohol in the bloodstream creates a "per se exigency that justices an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." The State of Missouri argued that the body's natural dissipation of alcohol in and of itself created an exigent circumstance. This "per se" approach was rejected in favor of an analysis that considers the totality of the circumstances. There may be circumstances relevant to an exigency analysis, including "the procedures in place for obtaining a warrant, the availability of a magistrate judge, and the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence." *McNeely*, 133 S.Ct. at 1568. The Court of Criminal Appeals then reviewed the totality of the circumstances and concluded that the warrantless blood draw was not justified by exigent circumstances.

Cole v. State

In *Cole v. State,* 490 S.W.3d 918 (Tex.Crim.App. 2016), the trial court denied Cole's motion to suppress evidence obtained by a warrantless blood draw. The court of appeals reversed, holding that the record did not establish exigent circumstances. Here, the Court of Criminal Appeals determined that the warrantless search was justified.

The accident occurred at 10:30 p.m. in early December. Traveling at 110 miles per hour, Cole drove his large pickup down a city street. He ran a red light at a busy intersection, struck another truck causing an explosion which engulfed the latter in flames, killing the driver instantly. Officer Castillo testified because of the traffic and activity, many officers were needed on the scene to block off several major intersections and keep people away. The lead investigator, Officer Higginbotham, spent some three hours investigating the scene. Fourteen other officers were dispatched to assist. There was extensive damage to the victim's truck which had been T-boned such that the frame was bent into a crescent shape. The accident was not cleared until 6 a.m. the following morning. Officer Wright spoke with Cole, who was confused and did not know where he was. He told EMS that he had taken some methamphetamine. He was transported to the hospital. Wright arrested Cole at 11:38 p.m. and attempted to obtain a blood sample. Cole kept interrupting her while she read the statutory warnings, insisted he wasn't drunk, and refused to provide a sample. The officer asked hospital staff to draw the blood and this was performed forty-two minutes later. The sample contained intoxicating levels of amphetamine and methamphetamine.

Cole moved to suppress the results. Higginbotham testified that medical treatment, such as the administration of narcotic medicines, could affect the integrity of a blood sample. The trial court denied the motion, concluded that exigent circumstances justified the warrantless seizure, and noted the following circumstances:

- the accident required shutting down a major intersection;
- the severity of the accident and large debris field required the accident reconstruction expert to remain at the scene;
- the number of officers involved and the time to clear the intersection;
- the accident involved a death and was not a "regular DWI"; and

- the uncertainty of Cole's physical condition and the valid concern that medication administered at the hospital could affect the blood sample.

The court of appeals found that the trial court erred in failing to suppress the evidence. It noted that Higginbotham made no attempt to procure a warrant even though a magistrate was available. There was no indication what another officer was not available to obtain a warrant; and there was no evidence of the elimination rate of methamphetamine. The Court of Criminal Appeals granted discretionary review. Referring to *Weems,* the court concluded this case was controlled by *Schmerber* and *McNeely.* After recounting the testimony, it held:

> We do not disagree with the court of appeals' conclusion that '[t]here is no indication that officers not on the scene were unable to help obtain a warrant.' We do disagree, however, that an exigency finding cannot be made without the record establishing -- and by extension, the State proving -- that there was no other officer available to get a warrant in the lead investigator's stead. In all but the rarest instances, there will theoretically be an officer somewhere within the jurisdiction that could assist the lead investigator. Requiring such a showing in every case where exigency is argued improperly injects the courts into local law-enforcement personnel management decisions and public policing strategy. It further reduces the exigency exception to an exceedingly and inappropriately small set of facts, and would defeat a claim of exigency on the basis of a single circumstance in direct opposition to the totality-of-circumstances review *McNeely* requires.

Id. at 925-26. The court was particularly concerned about the integrity of the blood sample, noting that Higginbotham knew that during the ninety minutes necessary to obtain a warrant, Cole's body would continue to metabolize the methamphetamine.

> The court of appeals correctly notes that the record does not contain evidence regarding the rate the body metabolizes methamphetamine. But the lack of a known elimination rate of a substance law enforcement believes a suspect ingested does not necessarily mean that the body's natural metabolism of intoxicating substances is irrelevant to or cuts against the State's exigency argument. In fact, it serves to distinguish this case from *McNeely.*
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> The *McNeely* Court relied in significant part on the widely known fact that alcohol 'naturally dissipates over time in a gradual and relatively predictable manner.' The lack of a known elimination rate is at odds with the undercurrent running through the *McNeely* opinion: While time is of the essence, a minimally

> delayed test when dealing with an alcohol-related offense does not drain the test of reliability because experts can work backwards to calculate blood-alcohol content at an earlier date. In this case, without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know -- unlike alcohol's widely accepted elimination rate -- how much evidence it was losing as time passed.

Id. at 926-27. The opinion ends with a comparison to *Schmerber*, emphasizing that law enforcement was confronted not only by the destruction of evidence through natural dissipation but also with the constraints posed by a severe accident involving a death. *Id.* at 927.

We therefore conclude that Garcia's circumstances are more akin to *Cole* than to *Weems.* Garcia's accident resulted in three deaths, several cars afire, and the necessity of numerous officers on the scene. While his intoxication was induced by alcohol and cocaine metabolites rather than by methamphetamines, the Higginbotham concern persists. Inducing intervenous saline or other medication, particularly narcotic medication, would likely compromise the blood sample by impeding the ability to determine the rate of dissipation. For these reasons, we sustain the State's sole point and reverse and remand for trial.

February 24, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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