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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

SANDRA COY BRIGGS,
Appellant—Respondent
v.
THE STATE OF TEXAS,
Appellee—Petitioner

State's Petition for Discretionary Review from the
Thirteenth Court of Appeals, Corpus Christi—Edinburg, Texas
No. 13-15-00147-CR

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ORAL ARGUMENT REQUESTED

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge who presided over the original plea was the **Honorable Maria Teresa Herr** then Presiding Judge of the 186th Judicial District Court, Bexar County, Texas, and the judge who presided over the motion for new trial was the **Honorable Jefferson Moore**, Presiding Judge of the 186th Judicial District Court, Bexar County.

The parties to this case are as follows:

1) **Sandra Coy Briggs** was the defendant in the trial court and Briggs in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Sandra Coy Briggs was represented at the time of her original plea by **Edward Piker**, State Bar No. 16008800, 315 S. Main Ave, San Antonio, TX 78204, and on her motion for new trial by **Dayna L. Jones**, State Bar No. 24049450, 1800 McCullough Ave, San Antonio, TX 78212.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, **Tamara Strauch**, **Charles Rich**, **David Henderson**, and **Nathan Morey**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys to the Thirteenth Court of Appeals were as follows:

1) Sandra Coy Briggs was represented by **Dayna L. Jones**, State Bar No. 24049450, 1800 McCullough Ave, San Antonio, TX 78212.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, **Jennifer Rossmeier Brown**, Assistant District Attorney, and **Enrico B. Valdez**, Assistant District Attorney, Paul

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The State of Texas is represented in this petition by **Nicholas "Nico" LaHood**, District Attorney, **Jennifer Rossmeier Brown, Nathan Morey**, and **Enrico B. Valdez**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

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STATEMENT REGARDING ORAL ARGUMENT

The State believes that oral argument will aid the Court in its resolution of the issues and, accordingly, requests oral argument. Oral argument will aid this Court because the opinion of the Thirteenth Court of Appeals confuses case precedent requiring the retroactive applicability of new opinions with the relevant legal standard for evaluating the voluntariness of a plea.

STATEMENT OF THE CASE

Sandra Coy Briggs ("Briggs") was indicted on one count of intoxication manslaughter resulting in the death of San Antonio police officer Sergio Antillon. (1 CR at 4) Briggs pled "no contest" on January 13, 2012 and a jury assessed her punishment at imprisonment for forty-five (45) years in the Texas Department of Criminal Justice, Institutional Division on January 20, 2012. (1 CR at 20, 144, 151, and 108-09).

STATEMENT OF PROCEDURAL HISTORY

Briggs did not initially pursue an appeal of her conviction and sentence. In 2014, Briggs filed a writ of habeas corpus alleging ineffective assistance of counsel for failure to file an appeal and this Court granted Briggs an out-of-time appeal. *Ex parte Briggs*, No. WR-82,035-01, 2014 Tex. Crim. App. Unpub. LEXIS 787, at *1 (Tex. Crim. App. Sep. 24, 2014). Briggs subsequently filed both an out-of-time motion for new trial and an out-of-time appeal. (1 CR at 123–35 and149) After a

hearing, the trial court denied Briggs's out-of-time motion for new trial on February 20, 2015. (1 CR at 148)

In a published opinion, a three judge panel of the Thirteenth Court of Appeals concluded that Briggs's original trial counsel "misrepresented the law to Briggs as it relates to the admissibility of her blood-draw evidence" rendering her plea involuntary. *Briggs v. State*, No. 13-15-00147-CR, 2017 Tex. App. LEXIS 1947, at *23 (Tex. App.—Corpus Christi, March 9, 2017). The court of appeals reversed Briggs's conviction and the trial court remanded the case for a new trial.

The State filed a motion for rehearing en banc and on November 21, 2017, the Thirteenth Court of Appeals granted the motion and withdrew its original opinion. *Briggs v. State*, No. 13-15-00147-CR, 2017 Tex. App. LEXIS 10891, at *1 (Tex. App.—Corpus Christi, November 21, 2017). Despite granting the motion, the Thirteenth Court of Appeals still found that Briggs's trial counsel "misrepresented the law" to her making her plea involuntary and reversed the conviction and remanded the case for a new trial. *Id*. at *23-25. Two justices, agreeing with the State's position in the motion for rehearing, dissented. *Id*. at *39. This petition is due on December 21, 2017.

GROUNDS FOR REVIEW

I. Whether the Court of Appeals erred in concluding that trial counsel's advice was a misrepresentation of the law that rendered Briggs's plea involuntary when the advice was based on the controlling precedent that existed at the time counsel's advice was given?

II. Does *Mestas v. State*, 214 S.W.3d 1 (Tex. Crim. App. 2007), permit or require a trial court to grant an out-of-time motion for new trial when the motion is based primarily on legal authority that could not have been invoked during the initial time period to file a motion for new trial? In the alternative, should *Mestas* be overruled?

RELEVANT PORTIONS OF THE RECORD

Briggs entered a plea of "no contest" to the charge of intoxication manslaughter on January 13, 2012. (3 RR at 14) The trial court found the plea to be voluntary and pronounced a forty-five (45) year sentence in accordance with a jury verdict on January 20, 2012. (1 CR at 24, 3 RR at 6–12, and 8 RR at 147–48) Briggs did not pursue an appeal.

On September 24, 2014, this Court granted habeas relief based on the trial court's findings that Briggs's trial counsel failed to perfect an appeal. (1 Supp. CR at 3-5); *Ex parte Briggs*, No. WR-82,035-01, 2014 Tex. Crim. App. Unpub. LEXIS 787, at *1 (Tex. Crim. App. Sep. 24, 2014). In granting relief, this Court ordered that "[a]ll time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues." *Id.* at *2.

On January 8, 2015, Briggs filed and presented a motion for new trial. (1 CR at 122-23). In her first ground for relief in the motion, Briggs asked the trial court to grant her a new trial on the basis of an involuntary plea. (1 CR at 127–32). In her second ground for relief, Briggs asked the trial court to grant her a new punishment hearing. (1 CR at 32–34) Briggs relied primarily on the Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013)—decided more than a year after she was sentenced—and the subsequent decisions from this Court and

the courts of appeals applying *McNeely* to searches conducted pursuant to § 724.012(b) of the Texas Transportation Code.

At the hearing on the motion for new trial, both Briggs and her original trial counsel, Ed Piker ("Piker"), testified. The Thirteenth Court's panel summarized Piker's testimony as follows:

> Piker testified that they considered a number of ways to challenge the admission of the blood evidence, but were unable to come up with an approach that would form the basis for a motion to suppress or that would keep the evidence out at trial. Instead, based on Piker's understanding of the law at the time—that a mandatory blood draw without the necessity of a warrant was proper in the event of serious bodily injury or death resulting from an accident—they decided Piker would not file a motion to suppress and Briggs would plead no contest and would allow a jury to assess punishment.

Briggs v. State, 2017 Tex. App. LEXIS 1947, at *3-4. The opinion also summarized Briggs's testimony thusly: "Briggs testified that she discussed the matter with Piker and was aware that the blood evidence would be problematic if she went to trial. She believed that the trial court would admit her blood evidence at trial, and if there had been a way to keep it from being used against her at trial, she would have wanted a trial." *Id*. at *5.

ARGUMENT

This Honorable Court should grant this petition because the Thirteenth Court of Appeals has decided an important question of law in a way that conflicts with decisions from both this Court and the United States Supreme Court. Tex. R. App. P. 66.3.

I. The court of appeals erred in concluding that trial counsel's advice was a misrepresentation of the law that rendered Briggs's plea involuntary because the advice was based on the controlling precedent that existed at the time counsel's advice was given.

The issue in the present matter warrants this Court's exercise of its caretaker function because the undisputed facts in this case have given rise to compelling issues of law, specifically, the conclusion that Briggs's plea was involuntary based on a development in the law that occurred more than a year after her trial.

The State agrees with the court of appeals that, to be consistent with due process of law, a guilty plea must be entered knowingly, intelligently, and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). To be "voluntary," a guilty plea must be the expression of the accused's own will and not induced by threats, misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970); *Kniatt*, 206 S.W.3d at 664. And a plea of guilty should not be accepted by the trial court unless it

appears that it is voluntary. *See Holland v. State*, 761 S.W.2d 307, 320 (Tex. Crim. App. 1988).

The State recognizes that the inaccurate advice of counsel can render a plea involuntary. When a defendant pleads guilty based on the erroneous advice of his counsel, the plea is not knowingly and voluntarily made. *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991). That is, a guilty plea will not support a conviction where the plea is motivated by significant misinformation conveyed by defense counsel. *Ex parte Kelly*, 676 S.W.2d 132, 134-35 (Tex. Crim. App. 1984).

Where the State disagrees with the court of appeals is that Briggs's trial counsel "misrepresented" the law to her at the time her plea was entered. Briggs pled "no contest" to the offense of intoxication manslaughter in January of 2012. The controlling precedent from this Court in effect at that time held that a warrantless blood-draw conducted pursuant to Chapter 724 of the Texas Transportation Code—Texas's implied consent statute—did not violate the Fourth Amendment. *See Beeman v. State*, 86 S.W.3d 613, 615 (Tex. Crim. App. 2002) ("The implied consent statute does that—it implies a suspect's consent to a search in certain instances. This is important when there is no search warrant, since it is another method of conducting a constitutionally valid search."); *see also State v. Johnson*, 336 S.W.3d 649, 661 (Tex. Crim. App. 2011). This precedent was followed by the Fourth Court of Appeals until the summer of 2014. *See Aviles v.*

State, 385 S.W.3d 110, 116 (Tex. App.—San Antonio, 2012 pet. ref'd), *vacated and remanded Aviles v. Texas*, 134 S.Ct. 902 (2014), *on remand Aviles v. State*, 443 S.W.3d 291 (Tex. App.—San Antonio 2014). Thus, it is not disputable that Piker's advice to Briggs was based on an accurate evaluation of the law at the time the advice was given.

Despite this, the majority of the court of appeals retroactively applied *Missouri v. McNeely*, 569 U.S. 141 (2013) and its progeny, *State v. Villareal*, 475 S.W.3d 784 (2015) (op. on reh'g), to assess the accuracy of counsel's advice and to reach its conclusion that Piker misinformed Briggs. The issue raised in this petition is whether counsel's advice to Briggs can properly be characterized as a "misrepresentation" that rendered her plea involuntary when counsel's advice was based on the controlling precedent that existed at the time his advice was given. Even assuming the panel was correct in concluding that *McNeely* and *Villareal* applied retroactively to Briggs's out-of-time appeal, the relevant authority from the United States Supreme Court and this Court do not support the court's conclusion that counsel's advice to his client must be assessed based on law that did not exist at the time advice was given.

In the State's original brief, in argument, and in our motion for rehearing, the State directed the court of appeals to the Supreme Court's opinion in *Brady v.*

United States, 397 U.S. 742 (1970). The majority did not substantively address this authority in its opinion. In *Brady*, the Supreme Court stated that a

> plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

Id. at 757. According to the Court:

> The fact that Brady did not anticipate *United States v. Jackson*, *supra*, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id. Simply put, a subsequent change in the law does not invalidate an earlier plea.

Nor is *Brady* the only opinion in which the Supreme Court has addressed this issue. In *McMann v. Richardson*, the Supreme Court explicitly stated that the fact that "a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." 397 U.S. 759, 773 (1970). At issue in *McMann* was a guilty plea that was based on the belief that the defendant's confession would be admissible at trial. *Id*. at 769, 771-72. Subsequent to the entry of the guilty plea,

the Supreme Court decided *Jackson v. Denno*[1] which, if it had been decided before the entry of the plea, would have affected the admissibility of the confession. *Id*. at 766. Because of this new opinion, the defendant sought to have his plea set aside essentially arguing "that the admissibility of his confession was mistakenly assessed and that… his plea was [therefore] an unintelligent and voidable act." *Id*. at 769.

In rejecting the argument, the Court reasoned that when a "defendant waives his state court remedies and admits his guilt, **he does so under the law then existing**; further, he assumes the risk [of] ordinary error in either his or his attorney's assessment of the law and facts." *Id*. at 774 (emphasis added). According to the Court, "[a]lthough he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove a serious dereliction on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." *Id*. at 774.

The Supreme Court continues to accept and apply the holdings in both *Brady* and *McMann*. *See e.g.*, *United States v. Ruiz*, 536 U.S. 622, 630-31 (2002) ("this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying

[1] 378 U.S. 368 (1974).

waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.") (citing *Brady*, at 757; *McMann*, at 770; *United States v. Broce*, 488 U.S. 563, 573 (1989); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Additionally, this Court has relied on these opinions as controlling precedent. *See Ex parte Palmberg*, 491 S.W.3d 804, 805 (Tex. Crim. App. 2016); *see also Ex parte Chandler*, 182 S.W.3d 350, 359–60 (Tex. Crim. App. 2005). Further, other Texas courts of appeals accept the general proposition. *See Hughen v. State*, 265 S.W.3d 473, 482 (Tex. App.—Texarkanna 2008, pet. granted), *affirmed* 297 S.W3d 330 (Tex. Crim. App. 2009) (citations omitted); *Worrell v. State*, 751 S.W.2d 566, 567 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd).

Based on this case law, it is clear that the majority's opinion in this case erred in evaluating Piker's advice at the time the plea was entered in light of subsequent changes in the law. The controlling precedent that existed at the time the advice was given was that a blood-draw conducted pursuant to Texas's implied consent statute did not require a warrant and did not violate the Fourth Amendment. *See Pesina v. State*, 676 S.W.2d 122, 124 (Tex. Crim. App. 1984) (citing to *Schmerber* for the proposition: "consent to obtain a blood sample is not constitutionally required when an accused is under arrest"); *Stidman v. State*, 981 S.W2d 227, 228-29 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (blood draw

based on section 724.012(b) did not violate Fourth Amendment); *Beeman*, 86 S.W.3d at 616 ("The implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood *in the absence of a search warrant*." (emphasis added); *Aviles*, 385 S.W.3d at 116 (warrantless blood draw pursuant to section 724.012(b) did not violate Fourth Amendment). Therefore, the Thirteenth Court of Appeals erred in concluding that trial counsel "misrepresented" the law to Briggs and the trial court's denial of Briggs's motion for new trial was proper.

II. *Mestas v. State,* 214 S.W.3d 1 (Tex. Crim. App. 2007) does not permit or require a trial court to grant an out-of-time motion for new trial when the motion is based primarily on legal authority that could not have been invoked during the initial time period to file a motion for new trial.

This ground is not based on a theory presented to the trial court or court of appeals.

This ground is based upon a theory not advanced in the courts below. Nevertheless, the State asks the Court to consider this ground for two reasons. First, the State was the prevailing party in the trial court; therefore, it should be able to rely on any applicable legal theory. *See State v. Herndon*, 215 S.W.3d 901 n.4 (Tex. Crim. App. 2007). Second, this Court has discretion to consider matters for the first time on petition for discretionary review when they are raised by the party that prevailed in the trial court. *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007). In this ground the State asks this Court to either limit its

previous holding in *Mestas* or, in the alternative, to overrule *Mestas*. Because such a request is futile in a court of appeals, the State respectfully asks this Court to exercises its discretion and examine the applicability of *Mestas* to the present case on discretionary review.

> ***Should this Court's holding in Mestas v. State permit or require a trial court to consider the merits of a motion for new trial under the circumstances of this case?***

In *Mestas v. State*, 214 S.W.3d 1 (Tex. Crim. App. 2007), this Court held that an appellant bringing an out-of-time appeal could extend the filing deadline for a notice of appeal by filing a motion for new trial. *Id.* at 9–10. This case presents a novel application of the *Mestas* holding because, for the first time, a court of appeals has reversed a trial court for failing to grant a motion for new trial brought within the context of an out-of-time appeal. As a result, Briggs has received a windfall remedy that is inconsistent with this Court's habeas order granting relief.

The holding in *Mestas* notwithstanding, a criminal defendant is entitled to the assistance of counsel during the period for filing a motion for new trial. *Cooks v. State*, 240 S.W.3d 906, 912 (Tex. Crim. App. 2007). Absent specific proof to the contrary, it is presumed that a defendant is adequately represented during the thirty days following the imposition of sentence. *Id.* at 911. Where a defendant seeks relief on the basis of ineffective assistance of counsel, she must plead facts to

support the claim. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

Here, this Court's habeas order does not reflect that Briggs pled facts to support a claim nor does the order reflect that trial counsel was ineffective for failing to file a motion for new trial in 2012. This Court only granted Briggs relief "to obtain a meaningful appeal." *Ex parte Briggs*, No. WR-82,035-01, at *2. Accordingly, the habeas relief ordered by this Court establishes that Briggs did not rebut the presumption that she was adequately represented in the initial 30 days following her conviction in 2012. *Cooks*, 240 S.W.3d at 911.

The court of appeals decision, however, was based on a development in Fourth Amendment case law that occurred after Briggs's trial and prior to her obtaining the out-of-time appeal. Specifically, Briggs and the court of appeals rely primarily on *McNeely*—a case decided more than a year after Briggs entered her plea—to grant her relief. Had Briggs timely appealed after the imposition of her sentence on January 20, 2012, her appeal would have likely concluded before the end of the year.[2] (8 RR at 1 and 147–48)

The Supreme Court commands that "Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not

[2] According to the Office of Court Administration, the average criminal appeal lasted 8.6 months between filing and disposition. *See* http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf#page=94 (Accessed December 21, 2017).

unnecessarily infringe on competing interests.'" *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981)). In accordance with this principle, this Court and lower courts have granted defendants a wide variety of Sixth Amendment remedies. *See Ex parte Cockrell*, 424 S.W.3d 543, 555 (Tex. Crim. App. 2014) (granting entire new trial to defendant who was deprived of interpreter due to ineffective assistance of counsel); *Ex parte Owens*, 206 S.W.3d 670, 676 (Tex. Crim. App. 2006) (granting opportunity for out-of-time petition for discretionary review due to ineffective assistance of counsel); *Belcher v. State*, 93 S.W.3d 593, 600–01 (Tex. App.—Houston [14th Dist.] 2002, pet. dism'd) (granting an abatement only for trial court to hold hearing on motion for new trial because trial lawyer was ineffective for failing to secure hearing).

In this case, the court of appeals decision results in Briggs being granted a windfall beyond the relief necessary to repair the injury of her lawyer's failure to perfect an appeal in 2012. *See Lafler*, 566 U.S. at 170 (remedy for ineffective assistance must cure taint and not grant needless windfall). The purpose of granting an out of time appeal is to figuratively turn back the clock so that an appellant may pursue an appeal. *Mestas*, 214 S.W.3d at 4. The combination of *Mestas* and the instant decision by the court of appeals permits Briggs to pluck her trial from the past and move it forward in time, taking advantage of new and favorable developments in the law.

Like Briggs, the vast majority of defendants enter pleas of guilty to criminal charges. *See Missouri v. Fry*, 566 U.S.134, 143 (2012) (noting that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas). Accordingly, many defendants in Texas have likely pled guilty to crimes after their porch was sniffed by a police dog or their cell phone searched without a warrant. *See Florida v. Jardines*, 569 U.S. 1, 11–12 (2013) (a dog sniff at the front door of a private residence is a search); *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (requiring police to get warrants prior to searching contents of cell phone).[3] And, like Briggs, many of these defendants would undoubtedly seek to relitigate the strength of the prosecution's case applying later, more favorable case law in out-of-time motions for new trial. If the court of appeals is correct, these defendants may very well get this opportunity because out-of-time appeals are frequently granted by this Court.

As an alternative, this Court should consider overruling Mestas.

This Court has acknowledged circumstances that make it prudent to overrule prior precedent. These factors are:

[3] Or consider that this Court recently concluded that a warrantless search of four days of historic cell-site location data did not violate the Fourth Amendment. *Ford v. State*, 477 S.W.3d 321, 334–35 (Tex. Crim. App. 2015). However, a similar case is now under review by the Supreme Court which could yield yet another victory for criminal defendants. *Carpenter v. United States*, No. 16-402, 2017 U.S. LEXIS 3686, 2017 WL 2407484 (Jun. 5, 2017) (granting certiorari to consider whether warrantless search of cell-site location data is constitutional).

> (1) that the original rule or decision was flawed from the outset, (2) that the rule's application produces inconsistent results, (3) that the rule conflicts with other precedent, especially when the other precedent is newer and more soundly reasoned, (4) that the rule regularly produces results that are unjust, that are unanticipated by the principle underlying the rule, or that place unnecessary burdens on the system, and (5) that the reasons that support the rule have been undercut with the passage of time.

Ex parte Lewis, 219 S.W.3d 335, 338 (Tex. Crim. App. 2007) (internal citations omitted).

Mestas conflicts with Cooks, decided later the same year.

Less than a year after *Mestas* was decided, this Court concluded the period to file a motion for new trial is a critical stage where a defendant is entitled to counsel but that there is also a rebuttable presumption that a defendant is adequately represented. *Cooks*, 240 S.W.3d at 911–12. Considering this Court's practice of granting out-of-time appeals in light of *Cooks*, an appellant who wins an out-of-time appeal, and only an out-of-time appeal, should not be able to pursue an out-of-time motion for new trial because there is an unrebutted presumption that they were adequately represented at the time of trial.

This Court recognizes that motions for new trial are primarily used for claims of newly discovered evidence or jury misconduct. *See Oldham v. State*, 911 S.W.2d 354, 361 (Tex. Crim. App. 1998). Certainly a defendant would be entitled to habeas relief if he could show that that his lawyer was ineffective for failing to pursue one of these claims. But the law should require the defendant to plead and

prove these specific facts. A successful claim that a lawyer failed to perfect an appeal should not categorically result in an opportunity to file an out-of-time motion for new trial. In this respect, *Mestas* should be reconsidered in light of *Cooks*.

Mestas produces results that are unjust, unanticipated, and place unnecessary burdens on the system.

Briggs entered her plea in 2012 and, after obtaining an out-time-appeal, has challenged the voluntariness of her plea based on a 2013 Supreme Court decision. The constantly evolving nature of American constitutional law provides a great benefit to persons accused of crimes. Each year this Court and the Supreme Court decide matters that render entire categories of evidence inadmissible. To balance these decisions, both this Court and the Supreme Court impose reasonable limits on defendants who invoke favorable precedent.

For example, this Court limits what claims may be raised in a postconviction application for habeas corpus. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). This Court also limits the availability of judicial precedent decided after a defendant's conviction has become final. *Ex parte De Los Reyes*, 392 S.W.3d 675, 678 (Tex. Crim. App. 2013). Finally, to the extent that a defendant may try to litigate the admissibility of trial evidence within a claim of ineffective assistance of counsel, this Court has made clear that a defendant may not normally

rely on "legal advice which only later proves to be incorrect." *Chandler*, 182 S.W.3d at 359–60.

The opinion below requires trial judges to grant out-of-time new trials to defendants who would likely not qualify for relief under the usual rules. As a consequence, the State will have to try defendants after years of delay when the availability of witnesses or evidence from the first trial may be limited. This is an unjust and unnecessary consequence of *Mestas*.

Should this Court limit the holding of *Mestas* or overrule it altogether, it will not prevent defendants from seeking out-of-time new trials. It will simply ensure that the remedies afforded to such defendants do not result in windfall relief. By doing so, this Court will continue to strike a proper balance between the accused and the State by allowing defendants to vigorously litigate their constitutional rights while also ensuring that the passage of time does not erode the finality of criminal judgments.

PRAYER

The State prays that this Honorable Court grant this petition and reverse the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Enrico B. Valdez, Assistant Criminal District Attorney, Bexar County, Texas, certify, in accordance with Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure that this document contains 3,906 words.

/s/ Enrico B. Valdez
ENRICO B. VALDEZ

CERTIFICATE OF SERVICE

I, Enrico B. Valdez, Assistant Criminal District Attorney, Bexar County, Texas, certify that a copy of the foregoing motion will be provided to Dayna L. Jones, Attorney for the Briggs, 1800 McCullough Avenue, San Antonio, Texas 78212, on this the 21st day of December, 2017.

/s/ Enrico B. Valdez
ENRICO B. VALDEZ

NUMBER 13-15-00147-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SANDRA COY BRIGGS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 186th District Court
of Bexar County, Texas.

DISSENTING OPINION ON RECONSIDERATION

Before the Court En Banc
Dissenting Opinion on Reconsideration by Justice Contreras

The State argues that Briggs's guilty plea was not involuntary merely because (1) Briggs's trial counsel advised her that evidence obtained from her blood draw would be admissible at trial, and (2) the United States Supreme Court's decision in *Missouri v. McNeely* cast doubt upon that advice. I dissent because I agree with the State, and I

would find that the trial court did not abuse its discretion in denying Briggs's motion for new trial.

The State's motion cites two seminal United States Supreme Court cases: *Brady v. United States*, 397 U.S. 742 (1970) and *McMann v. Richardson*, 397 U.S. 759 (1970).[1] Like Briggs, the petitioners in these cases asserted that their guilty pleas were involuntary because their counsel gave bad information or advice. In *Brady*, petitioner's counsel advised him that the death penalty would be possible if he went to trial, and petitioner pleaded guilty based upon that advice, but a later case—*United States v. Jackson*—held the applicable death penalty statute to be unconstitutional. 397 U.S. at 748. Nevertheless, the Court found petitioner's guilty plea to be voluntary because "[h]e was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties." *Id*. at 756. The Court noted:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was

[1] The State cited *Brady* but not *McMann* in its brief on original submission. This Court cited neither case in our opinion of March 9, 2017.

entered.

> The fact that Brady did not anticipate *United States v. Jackson*, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id. at 757 (citation omitted).

McMann similarly held that petitioner's guilty plea was not involuntary, even though counsel advised him that his confession would be admissible, and a later decision—*Jackson v. Denno*—rendered that advice dubious. *See* 397 U.S. at 771–72. The *McMann* Court made several observations which are relevant to the circumstances of this case:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
>
> That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by

a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.

In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

. . . .

We are unimpressed with the argument that because the decision in *Jackson* has been applied retroactively to defendants who had previously gone to trial, the defendant whose confession allegedly caused him to plead guilty prior to *Jackson* is also entitled to a hearing on the voluntariness of his confession and to a trial if his admissions are held to have been coerced. A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. Whether or not the advice the defendant received in the pre-*Jackson* era would have been different had *Jackson* then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. It might be suggested that if *Jackson* had been the

> law when the pleas in the cases below were made—if the judge had been required to rule on the voluntariness of challenged confessions at a trial—there would have been a better chance of keeping the confessions from the jury and there would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any particular case and not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea. The alternative would be a per se constitutional rule invalidating all New York guilty pleas that were motivated by confessions and that were entered prior to *Jackson*. This would be an improvident invasion of the State's interests in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time. It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk o[f] ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.

Id. at 769–71, 773–74 (footnotes omitted).

The Texas Court of Criminal Appeals recently invoked both *Brady* and *McMann* in determining that a plea of guilty to possession of cocaine was voluntary, even though it was later discovered that the State could not prove the substance the defendant possessed was cocaine because there was not enough substance to test. *See Ex parte Palmberg*, 491 S.W.3d 804, 810 (Tex. Crim. App. 2016). The Court remarked:

> As the Supreme Court's cases described above make clear, the voluntariness of a defendant's guilty plea is not contingent upon his awareness of the full dimension of the prosecution's case. While any defendant who is deciding whether or not to plead guilty would certainly prefer to be apprised of his exact odds of an acquittal at trial, the reality is that every defendant who enters a guilty plea does so with a proverbial roll of the dice. Naturally, the more information the defendant acquires beforehand about the prosecution's case, the better informed his decision to plead guilty will be, providing him the opportunity to make a "wise" plea. But even if the defendant is less well-informed, as long as he has a sufficient awareness of his circumstances—including an awareness that some facts simply remain unknown to him or are undetermined as of the time of the plea—his potentially unwise plea is still a voluntary one.

> There could be any number of situations in which evidence the defendant initially thought admissible is actually inadmissible, a witness thought to be available is actually unavailable, or, as in this case, evidence thought to be subject to forensic testing is, in fact, not testable. The correct question for due process purposes is not whether Applicant knew every fact relevant to the prosecution of his case. Rather, the correct question is whether he was aware of sufficient facts—including an awareness that there are or may be facts that he does not yet know—to make an informed and voluntary plea.
>
> . . . .
>
> All of this is not to say that we would never grant an uninformed Applicant relief. If an applicant was affirmatively led to believe that the substance could definitively be tested due to misrepresentations by the State, or perhaps because of ineffective assistance of counsel, then his plea might be constitutionally challengeable. But neither the record nor Applicant's brief suggests any prosecutorial misrepresentation or ineffectiveness of defense counsel. Perhaps Applicant knew that law enforcement possessed the substance found on his person at the time of arrest, but he did not know whether or not it had been tested, or even whether or not it could have been tested. So long as Applicant was aware that this was still an unknown variable in his prosecution—so long as he knew what he did not know—then he was sufficiently aware of the relevant circumstances surrounding his case. The fact that his roll of the dice did not turn out as favorably as it might have had he proceeded to trial is not a ground for invalidating his plea.

Id. at 809, 810 (footnotes and citation omitted).

The involuntariness claims in *Brady*, *McMann*, and *Palmberg* were raised by petitions for habeas corpus, whereas Briggs's case is technically on direct appeal from the denial of a motion for new trial. Nevertheless, I see no reason why those cases, and the principles elucidated therein, should not apply here. Whether brought via a collateral or direct attack, a claim that conviction violated due process because of an involuntary plea requires the appellate court to ask the same question: Was the plea "a voluntary and intelligent choice among the alternative courses of action open to the defendant"? *See id*. at 807 (habeas petition); *State v. Diaz–Bonilla*, 495 S.W.3d 45, 53 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (direct appeal); *Anthony v. State*, 457 S.W.3d 548,

552 (Tex. App.—Amarillo 2015), *rev'd on other grounds*, 494 S.W.3d 106 (Tex. Crim. App. 2016) (direct appeal); *Gutierrez v. State*, 65 S.W.3d 362, 368 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 108 S.W.3d 304 (Tex. Crim. App. 2003) (direct appeal); *Ainsworth v. State*, 973 S.W.2d 720, 723 (Tex. App.—Amarillo 1998, no pet.) (direct appeal); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (direct appeal). It follows that, regardless of whether a guilty plea is challenged directly or collaterally, it may not be vacated as involuntary merely because the "good-faith evaluations of a reasonably competent attorney" turn out to be mistaken. *See McMann*, 397 U.S. at 770.

It is true, as we stated in our opinion, that because the instant case comes to us on direct appeal, we are required to apply any new rules that have been created or announced by higher courts since the judgment of conviction was rendered—regardless of whether the rule constitutes a clear break from precedent—and that we would not be required to do so when reviewing a collateral attack on an already-final judgment. *Compare Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) *and McClintock v. State*, 444 S.W.3d 15, 18 n.8 (Tex. Crim. App. 2014) (direct appeals) *with Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). Accordingly, as we correctly stated in our opinion, the rule set forth by the United States Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552 (U.S. 2013), must be applied retroactively to Briggs's case.

But to say that we are required to apply *McNeely* retroactively to this case does not mean that Briggs's trial counsel made a material misrepresentation or provided

ineffective assistance when he failed to anticipate it.[2] Instead, under *Brady* and *McMann*, Briggs "is bound by [her] plea and [her] conviction unless [s]he can allege and prove serious derelictions on the part of counsel sufficient to show that [her] plea was not, after all, a knowing and intelligent act." *McMann*, 397 U.S. at 774. She has not made that showing because it is undisputed that counsel's advice comported with the prevailing professional view of the law at the time the advice was rendered. Under such circumstances, I do not believe counsel's advice—that the blood evidence would be admitted at trial—constitutes a "misrepresentation" of the sort that would render a guilty plea involuntary. *See Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015) (noting that misrepresentations by defense counsel may cause a plea to be involuntary).

Moreover, although Briggs couches her claim in terms of "misrepresentation" by defense counsel, I believe it may also be accurately viewed as a challenge to the effectiveness of trial counsel's assistance. We evaluate claims of ineffective assistance using the familiar *Strickland* standard, under which a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance was prejudicial, resulting in an unreliable or fundamentally unfair outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Texas Court of Criminal Appeals has recognized that *Strickland* applies "[w]hen a defendant enters his

[2] To say that certain higher-court case law "applies retroactively" means only that it constitutes precedent which we, as an appellate court, are bound to follow. Accordingly, had Briggs's trial counsel filed a motion to suppress the blood evidence, and had that motion been denied, we would certainly apply the tenets of *McNeely* in evaluating the merits of that ruling, because the case is on direct appeal. But that is not the situation we are presented with here. We are not reviewing a trial court's decision to suppress or not to suppress evidence, but rather, we are reviewing the trial court's determination that Briggs's plea was made voluntarily. That review necessarily entails determining whether the plea was induced by misrepresentation, but there is no authority requiring this Court to impute knowledge of subsequently-decided case law to counsel in making that determination.

plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel." *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) *see Ex parte Harrington*, 310 S.W.3d 452, 459 (Tex. Crim. App. 2010) ("When counsel's representation falls below [the *Strickland*] standard, it renders any resulting guilty plea involuntary."). This is true for both collateral and direct attacks. *See Riley v. State*, 378 S.W.3d 453, 458 (Tex. Crim. App. 2012) (direct appeal); *Ex parte Moussazadeh*, 361 S.W.3d 684, 691 (Tex. Crim. App. 2012) ("To obtain habeas corpus relief on a claim of involuntary plea, an applicant must meet both prongs of the *Strickland* standard.").

Notwithstanding that *McNeely* applies retroactively to this case, Briggs has not satisfied either *Strickland* prong. First, as noted, counsel's advice that Briggs's blood evidence would be admitted was not only within the wide range of reasonable professional assistance, it was the predominant view of practitioners and courts at the time the advice was given. *See Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) ("[C]ounsel's performance will be measured against the state of the law in effect during the time of trial and we will not find counsel ineffective where the claimed error is based upon unsettled law."). Second, the trial court found that there were exigent circumstances which would have made the blood admissible even if counsel had anticipated *McNeely* and filed a motion to suppress based on its holding. That finding was supported by the evidence at the new trial hearing, and so we are required to give deference to it. *See Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005). Accordingly, even if counsel was ineffective by failing to anticipate *McNeely*, Briggs has not shown that the ineffectiveness prejudiced her defense.

For the foregoing reasons, I would find that the record in this case supports the trial court's implicit finding that Briggs's guilty plea was voluntary. Therefore, I respectfully dissent.

DORI CONTRERAS
Justice

Dissenting Opinion on Reconsideration joined by Justice Longoria

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the 21st
day of November, 2017.

NUMBER 13-15-00147-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SANDRA COY BRIGGS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 186th District Court of Bexar County, Texas.

OPINION ON RECONSIDERATION

Before the Court En Banc
Opinion on Reconsideration by Justice Rodriguez

Pending before the Court is the State's Amended Motion for Rehearing En Banc, which the Court construes as a motion for en banc reconsideration. *See* TEX. R. APP. P. 49.7. We grant the motion and withdraw our original opinion and judgment, dated March 9, 2017, and we substitute the following opinion, dissenting opinion, and the

accompanying judgment.

Appellant Sandra Coy Briggs challenges the trial court's denial of her motion for new trial. By three issues, which we have reorganized and renumbered, Briggs contends the trial court abused its discretion when it denied her motion for new trial because: (1) it failed to rule on the issues presented; (2) Briggs's plea was not voluntary because it was induced by a misrepresentation of the law; and (3) the trial court's findings regarding exigent circumstances are not supported by the record. We reverse and remand.

I. BACKGROUND[1]

It is undisputed that on January 12, 2012, after being admonished by the trial court, Briggs pleaded no contest to the charge of intoxication manslaughter of a public servant without a plea bargain agreement and elected to have a jury assess her punishment. *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1) (West, Westlaw through 2017 1st C.S.). On January 20, 2012, after a hearing where the trial court admitted Briggs's blood results that showed a blood-alcohol level of .14 percent at the time of the draw, the jury found Briggs guilty of intoxication manslaughter of a public servant, found her vehicle a deadly weapon used or exhibited during the commission of the offense, and sentenced Briggs to forty-five years in the Texas Department of Criminal Justice–Institutional Division.

Briggs filed neither a timely motion for new trial nor a timely notice of appeal. However, the Texas Court of Criminal Appeals granted Briggs's application for a writ of

[1] This case is before the Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.). Because this is a transfer case, we apply the precedent of the San Antonio Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

habeas corpus, finding that Briggs was "entitled to the opportunity to file an out-of-time appeal" in this matter.[2] *Ex parte Briggs*, No. WR-82,035-01, 2014 WL 5369818, at *1 (Tex. Crim. App. Sept. 24, 2014) (per curiam) (not designated for publication). The court of criminal appeals also determined that "[a]ll time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issued," which was December 10, 2014. *Id.* In other words, the court concluded that Briggs's case was not yet final.[3] *See id.*

After mandate issued from the court of criminal appeals, Briggs filed her motion for new trial, urging, in relevant part, that she did not enter her plea voluntarily because counsel misrepresented the admissibility of her blood alcohol results under Texas Transportation Code section 724.012.[4] *See* TEX. TRANSP. CODE ANN. § 724.012. Briggs

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[2] The Texas Court of Criminal Appeals noted that the trial court determined that Briggs's counsel failed to file a notice of appeal timely. *Ex parte Briggs*, No. WR-82,035-01, 2014 WL 5369818, at *1 (Tex. Crim. App. Sept. 24, 2014) (per curiam) (not designated for publication).

[3] Although the court of criminal appeals spoke in terms of filing of an out-of-time appeal, the timeframe, calculated from December 10, allowed for the filing of Briggs's motion for new trial and a notice of appeal. *See id.* The trial court also found that the court of criminal appeals put Briggs in a position to "validly request a new trial." The State does not complain on appeal that the new trial motion was not properly before the trial court.

[4] Briggs also argued that the trial court should grant a new trial in the interest of justice. *See State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007) (explaining that although a judge may grant a new trial in the interest of justice, "[h]e cannot grant a new trial on mere sympathy, an inarticulate hunch, or simply because he personally believes that the defendant is innocent or received a raw deal") (internal quotations omitted)). The trial court made no findings on this ground, and Briggs does not develop an interest-of-justice appellate argument. So we need not address it. *See* TEX. R. APP. P. 47.1. We also note that Briggs makes no express argument in this direct appeal that she received ineffective assistance of counsel. *See Ex parte Palmberg*, 491 S.W.3d 804, 810 (Tex. Crim. App. 2016) ("In any event [Palmberg] does not bring an ineffective assistance of counsel claim . . . , nor has he explicitly alleged any incompetence on the part of trial counsel. For that reason, we limit our analysis and holding today to the voluntariness argument in his application."). We will not construe Briggs's voluntariness argument as an ineffective assistance of counsel claim and apply the *Strickland* standard of review as the dissent suggests. Instead, we limit our analysis and holding today to the voluntariness argument in Briggs's appeal. *See id.*

noted that, according to the police report attached to her motion, her warrantless blood draw was not taken pursuant to a recognized exception to the warrant requirement. Instead, according to the report, the warrantless draw was accomplished pursuant to the mandatory provisions of section 724.012 because an individual had suffered serious bodily injury and later death from the accident. *See id.* Briggs claimed that the admissibility of her blood test results was a determining factor in deciding to plead no contest to the charges, instead of exercising her right to a trial. Briggs also discussed the applicability of *Missouri v. McNeely* and opinions issued by Texas courts subsequent to her sentencing. *See* 133 S.Ct. 1552, 1558 (2013); *see also, e.g., State v. Villarreal*, 475 S.W.3d 784, 813 (Tex. Crim. App. 2015) (op. on reh'g); *Weems v. State*, 434 S.W.3d 655, 659–60 (Tex. App.—San Antonio 2014), *aff'd,* 493 S.W3d 574, 582 (Tex. Crim. App. 2016).

On February 18, 2015, at the hearing on her motion for new trial, Briggs's trial counsel Ed Piker explained that his chief concern in the case had been the blood evidence secured as a result of a warrantless search. According to Piker, because the blood evidence was a significant problem for the defense, his ultimate goal had been to either discredit the blood evidence or keep it from coming in at trial. Piker testified that they considered a number of ways to challenge the admission of the blood evidence, but were unable to come up with an approach that would form the basis for a motion to suppress or that would keep the evidence out at trial. Instead, based on Piker's understanding of the law at the time—that a mandatory blood draw without the necessity of a warrant was proper in the event of serious bodily injury or death resulting from an accident—they

decided Piker would not file a motion to suppress and Briggs would plead no contest and would allow a jury to assess punishment. Piker explained that he would have filed a motion to suppress had he understood the cases to hold that the transportation code cannot mandate a warrantless blood draw absent exigent circumstances, which he did not believe existed in this case "because [Briggs] was in custody from the very beginning." *See, e.g., McNeely,* 133 S.Ct. at 1558 (reaffirming *Schmerber v. California*, 384 U.S. 757, 767 (1966)); *Villarreal,* 475 S.W.3d at 813; *Weems*, 434 S.W.3d at 659–60. Piker stated that he would have advised Briggs to proceed to trial if the trial court had ordered the blood evidence suppressed.

Briggs also testified at the hearing on her motion for new trial. Briggs explained that she did not consent to have her blood drawn, but that an officer ordered it drawn based on the Texas blood-draw statute. *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1). Briggs testified that she discussed the matter with Piker and was aware that the blood evidence would be problematic if she went to trial. She believed that the trial court would admit her blood evidence at trial, and if there had been a way to keep it from being used against her at trial, she would have wanted a trial.[5]

After Briggs and the State rested and presented closing arguments at the motion-for-new-trial hearing, the trial court asked the State if it had "any exigent circumstances it [could] point to in this case with Ms. Briggs, assuming that the statute is unconstitutional

[5] At the hearing, the State offered Exhibits A (Court's Admonishment and Defendant's Waivers and Affidavit of Admonitions), B (Waiver, Consent to Stipulation of Testimony and Stipulations), and C (Trial Court's Certification of Defendant's Right of Appeal), and Briggs offered Defense Exhibit A (Piker's affidavit). The trial court admitted the exhibits into evidence.

and could not be effective for the State in this case?" The trial court continued: "Was there any other procedure that the officers could rely upon or the State could rely upon to say this was an exigent circumstance in this particular case and that's why a warrant would not have been able to have been obtained in the first place?"

In response to the trial court's questions, counsel for the State identified what he believed were exigent circumstances that night, but also informed the court that he "was not the trial attorney on that case at trial" and did not "know if the detectives handling the case were asked about [other fatalities going on that night] at trial." Counsel commented that he "didn't know if [the court] wanted to hear from an additional witness specifically regarding exigent circumstances or not." The trial court responded, "I'd like to," and allowed the State to call Sergeant Scott Foulke, a detective with the San Antonio Police Department's Traffic Investigation Unit, Homicide Division, who was at the scene that night.

Before Sgt. Foulke testified, Briggs made the following objection:

> I object to this line of testimony for one issue. We're not here on factual exigency circumstance basis in the Motion for New Trial. It's on whether or not the misrepresentations about the law to Ms. Briggs would have changed the course of how they proceeded with the case. And Mr. Piker and Ms. Briggs both testified that they would have done something differently. That's the standard that she needs to prove in order to obtain a new trial on an involuntary plea, so I would object to this line of testimony.

The trial court overruled this objection.

Sgt. Foulke provided testimony regarding the events of the night in question and his investigation, testimony that Briggs now argues completely contradicted the testimony of other officers at the punishment hearing in 2012. Nonetheless, at the hearing Sgt.

Foulke explained, among other things, that "[a]nytime it involves a crash or a fatal or a near-fatal incident, it's always exigent because you want that sample as close to the time of the crash so it's the most accurate. And so anytime we deal with something like this, we're under exigent circumstances." After Sgt. Foulke testified, the trial court recessed the hearing.

When the trial court reconvened the hearing two days later, it made the following oral findings:

> After considering the motion, the testimony, exhibits, the case law, arguments, and the defendant's latest filing of Supplemental Motion for New Trial, I find that the defendant is in a posture to request a new trial. Once the appellate courts granted an out-of-time appeal, that puts her in a position to validly request a new trial.
>
> I also find that she is no longer under a final judgment due to the out-of-time appeal. That being the case, she's entitled to have the law applied to her case that is in effect now and not at the time of the trial. Therefore, I find that *McNeely* can be applied retroactively to the defendant's case. However, when applying *McNeely*, I do not believe that *McNeely* affords relief for the defendant.
>
> *McNeely* provided that the deterioration of blood evidence alone is not an exigent circumstance to obtain blood from a suspect without a warrant. *McNeely* requires a case-by-case analysis of the facts on the totality of the circumstances. *McNeely* did not prohibit warrantless searches in all circumstances.
>
> Here, the facts show that the police unit dedicated to traffic fatalities was already involved in investigating an earlier fatality the same night this defendant caused her collision. The police relocated to defendant's crime scene and began their investigation. Due to the circumstances normal to any collision scene, such as allowing emergency medical personnel to conduct their procedures, to include ensuring that the defendant did not need further medical care, the police were delayed in determining that it was the defendant's actions that caused the collision. At that point, nearly three hours had lapsed since the time of the collision.

> This case was not a regular or normal driving while intoxicated case. It seems that the time period to obtain blood in a traffic stop resulting in a DWI arrest is closer to 1.3 hours. Here, it seems that the time was of the essence before the blood decayed. There were other factors, however.
>
> There was testimony as to Night CID, or Night Criminal Investigation Division, could have assisted the traffic unit in obtaining a warrant to draw the blood. Sergeant Foulke testified that he did not know the status of Night CID at the time and whether they were already engaged in their own investigations that night. Common sense would dictate that it would have taken longer to wait for a Night CID officer to appear and to have him or her be briefed on the situation in order for that officer to draft up a search warrant application.
>
> In addition, Sergeant Foulke testified that to obtain a warrant would have added an additional 1.5 hours to obtaining blood evidence. Furthermore, the resources available at the time of the crime were different than they are now. The training or manpower for obtaining DWI warrants has, since the time of the crime, been improved, and the process is now streamlined under the, quote, "no refusal," unquote, program.
>
> For instance, now police officers have laptop computers at their disposal to draft warrant applications on scene without returning to the police headquarters, as it would have been in the defendant's case at that time.
>
> When looking at all the factors in determining whether the blood could have been drawn without a warrant and considering that no mention—no Motion to Suppress was filed, it appears that the application of *McNeely* does not afford the defendant relief under new trial procedures via a Motion for New Trial because I believe obtaining a warrant in this situation would significantly undermine the efficacy of this search . . . .

The trial court made no express oral findings regarding the voluntariness of Briggs's plea. No written findings regarding voluntariness appear in the record. *See* TEX. R. APP. 21.8(b) ("In ruling on a motion for new trial, the court may make oral or written findings of fact."). The trial court denied Briggs's motion for new trial, and this appeal followed.

II. APPLICATION OF *MCNEELY* AND ITS PROGENY

As a threshold matter, we must determine whether *McNeely* and subsequent Texas cases that rely on *McNeely* apply in this case. Briggs contends that *McNeely* applies because it did not create a new rule but, instead, followed Fourth Amendment precedent on warrantless searches. Briggs also asserts that even if *McNeely* created a new rule, it still applies because her case is not yet final.

A. *McNeely* Did Not Set Out a New Rule

We agree that *McNeely* did not set out a new constitutional rule. *See State v. Tercero*, 467 S.W.3d 1, 9 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (citing *McNeely*, 133 S.Ct. at 1556–58). *McNeely* clarified its 1966 *Schmerber* holding. *Id.* (citing *McNeely*, 133 S.Ct. at 1556–58). In *Schmerber,* after observing that the blood-alcohol evidence could have been lost, "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant," the Court determined that there were exigent circumstances that supported a warrantless blood draw. 384 U.S. at 770. The *McNeely* Court explained that it applied the totality of the circumstances approach in *Schmerber*—considering all of the facts and circumstances of that particular case—and recognized that exigent circumstances might, in limited circumstances, provide an exception to the warrant requirement. *See Tercero*, 467 S.W.3d at 9 (citing *McNeely*, 133 S.Ct. at 1556–58). The *McNeely* Court explained that each case must be decided on its facts, as it did in *Schmerber*, and not on a "'considerable overgeneralization" that a per se rule would reflect. *McNeely*, 133 S.Ct. at 1561 (quoting

Richards v. Wisconsin, 520 U.S. 385, 393 (1997)). Thus, consistent with its *Schmerber* review, the *McNeely* Court determined that the natural metabolization of alcohol in the bloodstream is not a per se exigency that justifies an exigency exception to the Fourth Amendment's warrant requirement. *Id.* at 1556; *see also Weems v. State*, 493 S.W.3d 574, 578 (Tex. Crim. App. 2016) (determining that sections of the transportation code that require a blood draw in certain circumstances do not provide an exception to the warrant requirement absent exigent circumstances); *Villarreal*, 475 S.W.3d at 813 (same); *see also Pearson v. State*, No. 13-11-00137-CR, 2014 WL 895509, at *2–4 (Tex. App.—Corpus Christi Mar. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (upholding a warrantless, exigent-circumstances blood draw).[6]

B. Even if Setting Out a New Rule, *McNeely* Would Apply

Moreover, even were we to conclude that *McNeely* created a new rule, "newly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception.'" *Davis v. U.S.*, 564 U.S. 229, 243 (2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)); *see McClintock v. State*, 444 S.W.3d 15, 18 n.8 (Tex. Crim. App. 2014); *Steadman v. State*, 360 S.W.3d 499, 504 n.13 (Tex. Crim. App. 2012); *Taylor v. State*, 10 S.W.3d 673, 678 (Tex. Crim. App. 2000); *Tercero*, 467 S.W.3d at 9–10; *see also Bowman v. State*,

[6] We disagree with the dissent and the State that *Brady v. United States* and *McMann v. Richardson* control. *See Brady*, 397 U.S. 742, 757 (1970) (concluding that a subsequent change in the law did not invalidate an earlier plea; counsel did not present a faulty premise); *McMann*, 397 U.S. 759, 774 (1970) (granting review to consider "whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions of proof that the plea was motivated by a prior coerced confession" and explaining that when a "defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk [of] ordinary error in either his or his attorney's assessment of the law and facts.").

No. 05-13-01349-CR, 2015 WL 557205, at *10 (Tex. App.—Dallas 2015, no pet.) (not designated for publication). This is so whether or not the new rules constitute a clear break from past precedent. *Davis*, 564 U.S. at 253 (citing *Griffith*, 479 U.S. at 328).

As the trial court found, Briggs "is no longer under a final judgment due to the out-of-time appeal," and "[o]nce the appellate courts granted an out-of-time appeal, that puts her in a position to validly request a new trial." *See Griffith*, 479 U.S. at 321 n.6, 326–27 ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). In this case, the court of criminal appeals determined that the availability of Briggs's appeal had not been exhausted. *Ex parte Briggs*, 2014 WL 5369818, at *1; *see Griffith*, 479 U.S. at 326–28. The 2013 *McNeely* opinion, the 2015 *Villarreal* opinion, and the 2016 *Weems* opinion, among others, were, thus, delivered before Briggs's conviction became final. *See Griffith*, 479 U.S. at 326–28. Because Briggs is here on direct appeal in a procedural posture where her conviction is not yet final, *McNeely* and its progeny apply retroactively. *See id.*; *Tercero,* 467 S.W.3d at 9–10.

C. Summary

We conclude that *McNeely* and its progeny apply in this case because *McNeely* did not create a new rule and because, even had it done so, Briggs's conviction has not become final.

III. PRESERVATION

We next address the State's preservation argument. The State claims that Briggs failed to preserve "error relative to the blood evidence" because she did not file a pretrial motion to suppress the evidence, because she did not complain about the evidence at any time, and because she did not object to the introduction of the evidence at the punishment hearing. Briggs's complaint on appeal, however, is not that the trial court abused its discretion in admitting the blood-draw evidence. Instead, Briggs challenges the denial of her motion for new trial on the basis that her plea was not voluntary because counsel misrepresented the admissibility of the blood-draw evidence to her. The State's preservation argument has no merit.

IV. VOLUNTARINESS

A. Standard of Review

> We review a trial judge's denial of a motion for new trial under an abuse of discretion standard. We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable. A trial judge abuses his discretion in denying a motion for new trial when no reasonable view of the record could support his ruling.

Colyer v. State, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014) (internal quotations and citations omitted). Under the facts of this case then, we will review the voluntariness of Briggs's plea through this abuse of discretion standard of review. *See Cueva v. State*, 339 S.W.3d 839, 856–57 (Tex. App.—Corpus Christi 2011, pet. ref'd). We will reverse the trial court's decision as to the claims raised in Briggs's motion only if it is arbitrary or unreasonable. *See id*.

We also presume that all reasonable factual findings the court could have made against the losing party were made against that losing party. *See Colyer*, 428 S.W.3d at 122. And where the trial court has not made explicit fact findings in denying a motion for new trial—in this case, findings regarding voluntariness of Briggs's plea—we will imply all findings necessary to support the ruling "when such implicit factual findings are both reasonable and supported in the record." *Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005); *see State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007) (noting that appellate courts must defer to any reasonable implied fact findings the court might have made in denying a motion for new trial).

B. Applicable Law

1. Voluntariness of a Plea

A guilty plea or a plea of nolo contendere must be free and voluntary. TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West, Westlaw through 2017 1st C.S.). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Brady*, 397 U.S. 742, 748 (1970). We must set aside an involuntary guilty plea. *Fimberg*, 922 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (citing *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975)).

An accused, who attests that she understands the nature of her plea when she enters her plea of no contest and that it is voluntary, as in this case, has a heavy burden on appeal to show that her plea was involuntary. *See Fielding v. State,* 266 S.W.3d 627,

636 (Tex. App.—El Paso 2008, pet. ref'd); *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). However, a plea of no contest based on erroneous information conveyed to the defendant by her trial counsel is involuntary. *See Ex parte Barnaby*, 475 S.W.3d 316, 322 n.8 (Tex. Crim. App. 2015) (per curiam) (citing *Padilla v. Kentucky*, 559 U.S. 356 (2010) (involving defense counsel's failure to advise the defendant about the immigration consequences of a guilty plea); *Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012) (addressing defense counsel's misinformation regarding parole eligibility, on which the defendant relied in pleading guilty); *Ex parte Griffin*, 679 S.W.2d 15, 18 (Tex. Crim. App.1984) (concerning a defense counsel who told the defendant that his plea agreement included the disposition of an earlier criminal case, when in fact it did not) (en banc)).

2. Warrantless Search and Seizure

The Fourth Amendment provides in relevant part that "'[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV; *see* TEX. CONST. art. 1, § 9; TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (providing that evidence obtained in violation "of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America" shall not be admitted in evidence against the accused"). The taking of a blood specimen is a search and seizure under the Fourth Amendment and the Texas Constitution. *Schmerber*, 384 U.S. at 767; *Aliff v. State*, 627 S.W.2d 166, 169 (Tex. Crim. App. 1982).

A warrantless search or seizure is per se unreasonable unless it falls under a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Weems*, 493 S.W.3d at 578 (citing *Villarreal,* 475 S.W.3d at 808–09). There are several exceptions to the warrant requirement including "a warrantless search performed to prevent imminent evidence destruction." *Weems*, 493 S.W.3d at 577–78. Yet while the imminent destruction of the evidence may be the antagonizing factor central to law enforcement's decision, the totality of the circumstances, including factors such as alcohol's natural dissipation, what procedures were 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," must also be considered to determine whether there are exigent circumstances that support a warrantless blood draw. *Id.* at 580 (quoting *McNeely,* 133 S.Ct. at 1558 (reaffirming *Schmerber*). In other words, neither the natural metabolization of alcohol in the bloodstream, *see McNeely*, 133 S.Ct. at 1556, nor, as in this case, an accident resulting in a serious injury or death, alone, creates a per se exigency that justifies an exception to the warrant requirement. *See Weems*, 493 S.W.3d at 578. Instead, there must "be circumstances surrounding law enforcement's decision to forego obtaining a warrant [in the blood-draw context] that withstand Fourth Amendment scrutiny." *Id.* at 580. The State must "meet its burden and establish that exigent circumstances existed to satisfy the Fourth Amendment's reasonableness standard." *Id.* at 582.

3. Texas Transportation Code Section 724.012

Section 724.012 of the transportation code, titled "Taking of Specimen," provides, in relevant part, the following:

> (b) A peace officer shall require the taking of a specimen of the person's breath or blood under any of the following circumstances if the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily:
>
> (1) the person was the operator of a motor vehicle or a watercraft Involved in an accident that the officer reasonably believes occurred as a result of the offense and, at the time of the arrest, the officer reasonably believes that as a direct result of the accident:
>
> (A) any individual has died or will die;
>
> (B) an individual other than the person has suffered serious bodily injury; or
>
> (C) an individual other than the person has suffered bodily injury and been transported to a hospital or other medical facility for medical treatment . . . .

TEX. TRANSP. CODE ANN. § 724.012(b)(1).

After *McNeely*, the Texas Court of Criminal Appeals has held that section 724.012, which requires a blood draw under certain circumstances, does not create a Fourth Amendment exception. *Villarreal,* 475 S.W.3d at 813 (discussing section 724.012 of the Texas Transportation Code). Our Court has observed that although the Texas mandatory blood-draw statute "required the officer to obtain a breath or blood sample, it did not require the officer to do so without first obtaining a warrant"; section 724.012 provides for a mandatory blood draw in certain circumstances, but not a mandatory, warrantless blood draw. *State v. Villarreal*, 476 S.W.3d 45, 58 (Tex. App.—Corpus

Christi 2014), *aff'd* 475 S.W.3d 784 (Tex. Crim. App. 2014). So section 724.012 does not provide an exception to the warrant requirement absent exigent circumstances. *See Weems*, 493 S.W.3d at 578; *see also* TEX. TRANS. CODE ANN. § 724.012.

C. Analysis

By her first issue, Briggs contends that the trial court abused its discretion when it denied her motion for new trial without ruling on the voluntariness issue raised in her motion. She asserts that the trial court, instead, denied her motion for new trial only on a finding that the blood evidence met the exigent-circumstances exception to the warrant requirement under *McNeely*. *See* 133 S.Ct. at 1558. By her second issue, Briggs claims that the trial court should have found that her plea was not voluntary because her counsel misrepresented the law regarding the admissibility of her warrantless blood-draw evidence and that the trial court should have granted her motion on that basis.

In response, while the State acknowledges that the trial court made express findings regarding the presence of exigent circumstances in the instant case but did not make any express findings regarding the voluntariness of Briggs's plea, it contends that the trial court implicitly found that Briggs's plea was knowing and voluntary at the time of trial. The State argues that because this implicit factual finding of voluntariness was reasonable and supported by the record, we should give deference to it. *See Johnson*, 169 S.W.3d at 239; *see also Herndon*, 215 S.W.3d at 905 n.5.

We agree with the State that the trial court expressly found that *McNeely* applied and expressly found that there were exigent circumstances that allowed for a mandatory,

warrantless blood draw. As the trial court expressed in the following, it denied Briggs's motion for new trial based on its exigent-circumstances findings:

> When looking at all the factors in determining whether the blood could have been drawn without a warrant and considering that no mention—no Motion to Suppress was filed, it appears that the application of *McNeely* does not afford the defendant relief under new trial procedures via a Motion for New Trial because I believe obtaining a warrant in this situation would significantly undermine the efficacy of this search . . . .

We also agree that the trial court made no express findings regarding the voluntariness of Briggs's plea. But we cannot agree with the State that the trial court implicitly found Briggs's plea was knowing and voluntary because, as discussed below, such an implicit factual finding of voluntariness is not reasonable and is not supported by the record, and we cannot give deference to it. *See Johnson*, 169 S.W.3d at 239; *see also Herndon*, 215 S.W.3d at 905 n.5.

Arresting Officer David Luther's report and the statutory warning form that appear in the appellate record provide that Officer Luther explained to Briggs that he was drawing her blood without a warrant pursuant to the mandatory provisions of the transportation code "because [of] injuries sustained by the victims in the accident she caused."[7] *See*

[7] At the motion-for-new-trial hearing, the State asked the trial court to take judicial notice of the entire record. Officer David Luther's report is from the trial court record and is a part of the appellate record, as is the statutory warning form.

According to arresting Officer Luther's report, Briggs "was advised of the mandatory blood draw because [of] the injuries sustained by the victims in the accident she caused." In addition, the "Statutory Authorization—Mandatory Blood Specimen" form provided that it invoked Officer Luther's authority under section 724.012(b) of the transportation code "to require the suspect to submit to the taking of a specimen of the suspect's blood as required by . . . Section 724.012(b)." *See* TEX. TRANSP. CODE ANN. § 724.012(b)(1) (West, Westlaw through 2017 1st C.S.). On the form, Officer Luther attested that he "reasonably believed" the accident occurred as the result of Briggs's int**o**xication. Officer Luther explained that when he arrested Briggs, he "reasonably believed that as a direct result of the accident" another person had died or would die, suffered serious bodily injuries, or suffered bodily injuries and was transported to a medical facility for medical treatment. *See id.*

TEX. TRANSP. CODE ANN. § 724.012(b)(1). The report revealed that after Briggs refused to provide a blood specimen, Officer Luther informed her "there would be a mandatory blood draw." He explained that the blood draw became mandatory after Briggs refused to provide a blood specimen.

Piker testified at the motion-for-new-trial hearing that when he represented Briggs, he, too, understood that "in the event of a serious bodily injury or death caused by or presumed to be caused by the introduction of alcohol and/or drugs that the blood draw was mandatory under the [Texas] Transportation Code." *See id.* He explained that he "advised Ms. Briggs of her rights at that time under the law, that [he] was aware of at that time." In addition, Piker testified that because of recent case law regarding warrantless blood draws, including *Villarreal*, he would have filed a motion to suppress and if it were granted, would have advised Briggs to proceed to trial. *See* 475 S.W.3d at 813.

Briggs also testified at the hearing. She explained that based on her discussions with Piker, she understood that the blood evidence from the mandatory, warrantless blood draw would be admitted and used against her at trial. According to Briggs, Piker's misrepresentation of the law regarding the admissibility of the results of her warrantless blood draw induced her to plead no contest.

Following *McNeely* with its clarification of *Schmerber*, Texas courts have determined that sections of the Texas Transportation Code requiring a blood draw in certain circumstances, including section 724.012, do not provide exceptions to the warrant requirement absent exigent circumstances. *See, e.g., Weems*, 493 S.W.3d at

578. An accident resulting in a serious injury or death, alone, does not create an exception to the warrant requirement. *See id*.

Having the benefit of *McNeely* and its progeny, cases that apply retroactively to Briggs, we conclude that Piker misrepresented the law to Briggs as it relates to the admissibility of her blood-draw evidence. Piker's explanation of the law as he understood it at the time of the accident stopped short of informing Briggs that the transportation code, specifically section 724.012, cannot mandate a warrantless blood draw absent exigent circumstances or that the State needed to show exigent circumstances before the trial court would admit the blood evidence from her warrantless blood draw.[8] This erroneous information conveyed to Briggs by her trial counsel resulted in Briggs's plea of no contest being involuntary. *See Ex parte Barnaby*, 475 S.W.3d at 322 (citing *Fimberg*, 922 S.W.2d at 207).

Briggs's motion for new trial challenged the voluntariness of her plea—whether Briggs's counsel misinformed her regarding the admissibility of blood evidence obtained through a warrantless blood draw. This was the issue before the trial court and not the presence of exigent circumstances. We cannot conclude that the trial court could have implicitly found that Briggs's plea was knowing and voluntary at the time of trial: such a factual finding would be unreasonable and unsupported by the record. *See Johnson*, 169 S.W.3d at 239; *see also Herndon*, 215 S.W.3d at 905 n.5.

[8] It is undisputed that counsel was not alone in his misunderstanding of the law. The San Antonio Police Department, at that time, worked with forms that set forth the procedure under section 724.012 of the transportation code for a mandatory, warrantless blood draw when a person refused to provide a blood specimen in this situation. *See id.* As noted above, such forms are a part of the record in this case.

Reviewing the trial court's denial of Briggs's motion for new trial under an abuse of discretion standard and the voluntariness of Briggs's plea through that same standard, we conclude that the trial court abused its discretion in denying Briggs's motion for new trial because no reasonable view of the record could support an implied ruling of voluntariness. *See Colyer*, 428 S.W.3d at 122; *Cueva*, 339 S.W.3d at 856–57. We sustain Briggs's first and second issues.[9]

V. CONCLUSION

We reverse and remand for a new trial.

NELDA V. RODRIGUEZ
Justice

Dissenting Opinion on Reconsideration by
Justice Contreras joined by Justice Longoria

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the 21st
day of November, 2017.

[9] Briggs's third issue asserts that the record does not support the trial court's exigent-circumstances findings. Briggs's motion for new trial, however, did not challenge the admission of her blood evidence on the basis that there were no exigent circumstances to overcome the warrant requirement. The State acknowledges that the only claim properly before the Court is whether Briggs's plea was voluntary. And even though the trial court found exigent circumstances, our determination that counsel misrepresented the law to Briggs does not change. There is nothing in the record that supports a finding that counsel's advice to Briggs was based on his consideration of exigent circumstances: the evidence establishes that it was based on the mandatory blood draw statute. Because the challenged findings are not dispositive of this appeal, we need not address them. *See* TEX. R. APP. P. 47.1.

Moreover, we offer no opinion as to whether exigent circumstances existed in this case. Such an opinion would be premature. We are reversing and remanding for a new trial on the basis that Briggs's plea was not voluntary—the sole issue before the trial court in Briggs's motion for new trial proceeding and now before this Court.