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COURT OF CRIMINAL APPEALS
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TEXAS COURT OF CRIMINAL APPEALS

No. PD-0563-19

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COURT OF CRIMINAL APPEALS
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Casey Allen Martin, Appellant,

v.

State of Texas, Appellee

On Discretionary Review from the Second Court of Appeals
No. 02-18-00333-CR

On Appeal from Criminal District Court No. 1, Tarrant County
No. 1515753D

Petition for Discretionary Review

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Lead Counsel of Record

Gregg Gallian
Gallian Defense Firm LLC
2001 Bryan Street Suite 1905
Dallas, TX 75201
Phone & Fax: 214-433-6303
Gregg@GallianDefenseFirm.com
Texas Bar No. 24085952

Lukas Z.S. Garcia
Crain Lewis Brogdon, LLP
3400 Carlisle Street, Suite 200
Dallas, TX 75204
Phone: 214-522-9404
Fax: 214-969-5522
LGarcia@crainlewis.com
Texas Bar No. 24100578

If the Petition is granted, oral argument is requested

I. Identity of Parties, Counsel, and Judges

Casey Allen Martin, Appellant

Michael Mowla, attorney for Appellant on discretionary review

Gregg Gallian, attorney for Appellant at trial, on appeal, and on discretionary review

Lukas Garcia, attorney for Appellant at trial, on appeal, and on discretionary review

State of Texas, Appellee

Sharen Wilson, Tarrant County District Attorney

Samantha Fant, Tarrant County Assistant District Attorney

Joseph Spence, Tarrant County Assistant District Attorney

Landon Wade, Tarrant County Assistant District Attorney

Judge Elizabeth Beach, Presiding Judge of Crim. Dist. Ct. No. 1, Tarrant County

Justice Elizabeth Kerr, Second Court of Appeals

Justice Wade Birdwell, Second Court of Appeals

Justice Dabney Bassel, Second Court of Appeals

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- *Martin v. State*, No. 02-18-00333-CR, 2019 Tex.App.-LEXIS 4011 (Tex.App.-Fort Worth May 16, 2019) (designated for publication)

V. Statement Regarding Oral Argument

Should the Court grant this petition, Appellant requests oral argument. *See* Tex. Rule App. Proc. 68.4(c) (2019). The facts and the arguments are presented well in this petition and will be presented well in the brief should the petition be granted. However, this appears to be a case of first impression in Texas and involves a question of broad legal significance that requires resolution by this Court. Thus, should the Court grant this petition, Appellant requests oral argument.

To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant respectfully submits this petition for discretionary review:

VI. Statement of the Case, Procedural History, and Statement of Jurisdiction

This petition requests that this Court review the Opinion of the Court of Appeals in *Martin v. State*, No. 02-18-00333-CR, 2019 Tex.App.-LEXIS 4011 (Tex.App.-Fort Worth May 16, 2019) (designated for publication). *See* Appendix. The Court of Appeals affirmed the Order of Deferred Adjudication ("Judgment") entered on June 18, 2018 (CR.35-37)[1] in which Appellant was placed on deferred adjudication community supervision for seven years for Possession of a Controlled Substance (methamphetamine) one gram or more but less than four grams under Tex. Health & Safety Code § 481.115(c) (2017).

On August 13, 2012, Appellant was indicted for possession of a Controlled Substance (methamphetamine) one gram or more but less than four grams under Tex. Health & Safety Code § 481.115(c) (2017): the grand jury alleged that on or about August 31, 2017, in Tarrant County, Texas, Appellant intentionally or knowingly possessed the controlled substance methamphetamine in an amount one gram or more but less than four grams, including adulterants or dilutants. (CR.5).

[1]The Clerk's Record is cited as "CR" followed by the page number. The Reporter's Record is cited as "RR" followed by the page or exhibit number.

Appellant filed a motion to suppress evidence seized from his home. (CR.13-15). After a hearing on the motion, the trial court denied it and entered Findings of Fact and Conclusions of Law ("FFCL"). (CR.16-20). Appellant pleaded guilty in exchange for deferred adjudication probation but reserved the right to appeal the ruling on the motion to suppress. (CR.24).

Appellant appealed the Judgment and FFCL. On May 16, 2019, the Court of Appeals affirmed. *Martin*, No. 02-18-00333-CR, 2019 Tex.App.-LEXIS 4011.

This petition for discretionary follows. Thus, this Court has jurisdiction over this case.

VII. Grounds for Review

Ground 1: In *Talent v. City of Abilene*, 508 S.W.2d 592 (Tex. 1974), peace officers were distinguished from firefighters, who "(have) no roving commission to detect crime or to enforce the criminal law." Unlike fire marshals, who are peace officers, firefighters do **not** have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, that firefighter's knowledge does **not** "impute" to a peace officer, and the officer should be prohibited from entering the home without a warrant.

- RR.6-61; CR.5, 13-20

See Tex. Rule App. Proc. 68.4(g) (2019).

VIII. Argument

1. **Ground 1: In *Talent v. City of Abilene*, 508 S.W.2d 592 (Tex. 1974), peace officers were distinguished from firefighters, who "(have) no roving commission to detect crime or to enforce the criminal law." Unlike fire marshals, who are peace officers, firefighters do not have general law-enforcement powers. Thus, absent an exigency that allows an officer to enter without a warrant, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, that firefighter's knowledge does not "impute" to a peace officer, and the officer should be prohibited from entering the home without a warrant.**

Introduction

This is an issue of first-impression in Texas. *Martin*, *id*. at *4. Are firefighters "peace officers" such that what they learn in entering a home after a fire-related emergency (i.e., to extinguish fires and save lives) imputes to a peace officer, allowing the officer to enter the home without a warrant when there are otherwise no exigent circumstances? The answer to this question should be "no."

The opinion of the Court of Appeals incorrectly finds that there was an "exigency" after firefighter Cook exited Appellant's home to inform Officer Hart that he saw contraband in plain view.

The facts adduced by the Court of Appeals are that on August 30, 2017, at approximately 10:47 p.m., the Bedford Fire Department ("BFD") was called to a fire at an apartment complex. *Martin*, *id*. at *2. Firefighter Cook located the source of the fire as an apartment on the second floor, with smoke and water flowing from the door. *Id*. Cook contacted the tenant, Appellant, who said he fell asleep while cooking on the stove. *Id*. BFD entered the apartment and extinguished a small fire on the

cooktop. *Id*. To ventilate the apartment Cook attempted to open a window in the back bedroom, kneeling on a futon to reach the window, and his knee touched a firearm. *Id*. Cook became concerned about his safety and the safety of other firefighters. *Id*. at *3. The firefighters observed other firearms and ammunition scattered throughout the apartment, giving Cook additional safety concerns. *Id*.

In plain view, Cook saw drug paraphernalia on dressers, tables, and a shelf in an open closet. *Id*. Cook called the police due to his safety concerns and the drug paraphernalia. *Id*. Officer Hart was dispatched. *Id*.

When Hart arrived, he contacted the BFD battalion chief, who told Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and BFD located guns and drug paraphernalia inside the apartment. *Id*. The chief told Hart that he was concerned about the safety of BFD due to what they had observed, and he wanted Hart to secure the apartment. *Id*.

Without a warrant, Hart entered the apartment and inspected each room, ending with the back bedroom, where he saw drug paraphernalia in plain view: a pipe or bong containing drug residue, a plastic baggies containing drug residue. *Id*. Based on the presence of drug paraphernalia, Hart believed that an offense had been committed, and he "froze" the apartment as a crime scene. *Id*.

Hart exited the apartment two minutes after his initial entry and determined that there was no one inside who could pose a safety risk. *Id*. at *3-4. BFD remained

at the scene while Hart entered and exited the apartment. *Id*. at *4. Additional officers went into the apartment to observe the contraband and to determine if they should obtain a search warrant. *Id*. Appellant, the sole resident, was arrested for possession of drug paraphernalia. *Id*.

The police did not obtain a search warrant until 3:12 a.m. on August 31, 2017. *Id*. In the warrant affidavit, an officer alleged that Cook and BFD had located what they believed to be drug paraphernalia inside the residence. *Id*. Police executed the search warrant and found the methamphetamine that is the subject of this case. *Id*.

In the FFCL, the trial court found that the firefighters' entry into the apartment was lawfully related to the exigent circumstance of combatting an ongoing fire, the firefighters would have been within their rights to seize the drug paraphernalia in plain view, Hart's entry was justified but that the TCCA had yet to address the issue, and firefighters could call officers to secure the scene of a fire and to observe in plain view, the same evidence that firefighters could seize. *Id*. at *5.

The Court of Appeals observed that a warrantless police entry into fire-damaged property is presumptively unreasonable unless it falls within the scope of an exceptions to the warrant requirement unless the fire is so devastating that no reasonable privacy interests remain in the ash and ruins. *Id*. at *7. And under *Payton v. New York*, 445 U.S. 573, 590 (1980), absent exigent circumstances, law enforcement may not enter a home without a warrant. *Martin*, *id*. at *8.

However, exigent circumstances created by a fire are **not** extinguished the moment the fire is put out but continue for a reasonable time after the fire has been extinguished to allow fire officials to fulfill their duties including making sure the fire will not rekindle and investigating the cause of the fire. *Id*. The determination of "reasonable time to investigate" varies with the circumstances of a fire. *Id*.

Under *Michigan v. Clifford*, 464 U.S. 287, 294 (1984), if evidence of criminal activity is discovered by firefighters during a lawful search under exigent circumstances, firefighters may seize it under the plain view doctrine. *Martin*, *id*. at *8-9 (more on this below, as the "firefighters" in Clifford were in fact investigators). And under *State v. Betts*, 397 S.W.3d 198, 206 (Tex.Crim.App. 2013), the requirements for seizure of an object in plain view are: (1) law enforcement must lawfully be where the object can be plainly viewed; (2) the incriminating character of the object in plain view must be immediately apparent; and (3) the officials must have the right to access the object. *Martin*, *id*. at *9.

Thus, the Court of Appeals found that the "exigency" of the fire gave the firefighters passage into the apartment and continued for a reasonable time after the fire had been extinguished to allow the firefighters to fulfill their duty to ventilate the apartment and ensure the fire was out for good. And while doing so, Cook encountered contraband in plain view. *Martin*, *id*. at *9.

As importantly, the Court of Appeals found that Cook could have seized the paraphernalia and taken it to the police station or handed it to officers outside the apartment. Thus, the Court of Appeals concluded that law enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel if the exigency is continuing and the emergency personnel are still lawfully present. *Id*.

Finally, the Court of Appeals concluded that police officers often fill many roles, including paramedic, social worker, and ***fire investigator***. (emphasis supplied). "When those roles overlap the role of criminal investigator, it is not unreasonable to allow officers 'to step into the shoes of' the firefighter to observe and to seize the contraband without first obtaining a warrant. Allowing this limited entry by an officer constitutes no greater intrusion upon the defendant's privacy interest than does a firefighter's entry." Thus, Hart's warrantless entry into the apartment was lawful under the Fourth Amendment. *Id*. at *9-14.

However, the testimony showed that there was in fact **no** fire-related exigency. In fact, there was **no** exigency at all allowing Cook to seize anything or Hart to enter the home without a warrant. As Hart testified (RR.49):

> **Question:** Okay. So in terms of exigency, Mr. Martin wasn't doing anything that was getting in the way of any sort of investigation? He wasn't trying to destroy evidence, right?
>
> **Hart:** Right.

> **Question:** He wasn't running into the apartment trying to hide anything, correct?
>
> **Hart:** Yes, sir.
>
> **Question:** So in terms of the investigation that you conducted that night, there was no actual exigency as to the evidence being destroyed, anything along those lines?
>
> **Hart:** No, sir.
>
> **Question:** Okay. So you went in there for a protective sweep, right?
>
> **Hart:** Yes, sir.

Hart's entry into Appellant's apartment based on a "protective sweep" was illegal because Appellant had **not** been arrested yet. **Nor** was there any evidence that the apartment harbored an individual posing a danger to those on the arrest scene. A protective sweep is **not** an exception to the warrant-requirement that allows the type of entry that Hart made.

A protective sweep is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Reasor v. State*, 12 S.W.3d 813, 815 (Tex.Crim.App. 2000). A properly limited protective sweep is allowed in conjunction with an in-home arrest when the searching-officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Id*. at 817. In fact, a protective sweep is not even an automatic right police possess when

making an in-home arrest. *Id*. at 816. Protective sweeps are permitted **only** when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene. *Id.*; *see* *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (holding that the Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.).

Thus, labeling what occurred as an "exigency" was materially incorrect and turned an illegal entry by Hart into a purported legal one based solely on information Hart obtained from Cook. Thus, there was **no** exigency that made Hart's warrantless entry into Appellant's apartment legal.

> **Unlike fire marshals, because firefighters have "no roving commission to detect crime or to enforce the criminal law" and "do not have general law-enforcement powers," absent an exigency that allows a peace officer to enter, if a firefighter enters a home to extinguish fires or save lives and notices contraband even in plain view, the firefighter's knowledge of the contraband does not "impute" to a peace officer, and the officer should be prohibited from entering the home without a warrant.**

In *Talent v. City of Abilene*, 508 S.W.2d 592, 596 (Tex. 1974), the Court discussed that a "fire chief" is "not a law enforcement official and has no roving commission to detect crime or to enforce the criminal law. He has no indictment power. His subordinates (i.e., regular firefighters), although they may have

extraordinary access to the property of others, are not employed as law enforcement officers." The issue in *Talent* dealt with a fire chief having no authority to order a polygraph test of a tenured employee about nonemployment related subjects. *Id*.

Undersigned counsel realizes the role of this Court and the Supreme Court of Texas and does not ask this Court to "affirm" *Talent*. However, the Supreme Court's observations in *Talent* are persuasive and highlights the differences between regular firefighters and fire marshals. And, these observations are statutory: firefighters are **not** peace officers. Under Tex. Code Crim. Proc. Art. 2.12(26), (32), & (35) (2018), peace officers include "(26) officers commissioned by the state fire marshal under Chapter 417, Government Code," "(32) the fire marshal and any officers, inspectors, or investigators commissioned by an emergency services district under Chapter 775, Health and Safety Code," and "(35) the fire marshal and any related officers, inspectors, or investigators commissioned by a county under Subchapter B, Chapter 352, Local Government Code."

Officers "commissioned by the state fire marshal under Chapter 417, Government Code" are fire marshals who have full law-enforcement powers and who **investigate** fires that destroy property or lives. Tex. Gov. Code § 417.007 (2019) & Tex. Gov. Code § 417.0075 (2019). And under Health and Safety Code Chapter 775, district fire marshals that have the same investigative powers may be created if the county does **not** have a county fire marshal. Tex. Health & Safety Code

§ 775.101 (2019). These fire marshals: (1) investigate the cause, origin, and circumstances of each fire that damages property; (2) determine whether the fire was caused by negligent or intentional conduct; and (3) enforce all state, county, and district orders and rules that relate to fires, explosions, or damages caused by a fire or an explosion. Tex. Health & Safety Code § 775.108 (2019). Finally, Local Government Code Chapter 352 Subchapter B allows the creation of county fire marshals. These fire marshals investigate fires [Tex. Local Gov. Code § 352.013 (2019)] and investigate suspected arson [Tex. Local Gov. Code § 352.015 (2019)].

Regular firefighters do **not** perform the duties of Texas fire marshals and related officers or other peace officers. For instance, the Austin Fire Department lists the duties of firefighters as:

Respond to various emergency calls including structural and environmental fires, traffic collisions, hazardous material spills, and medical aids;

Connect, lay, and operate water hose lines onto fire;

Operate other fire-extinguishing appliances, perform search-and-rescue procedures, utilize hand-and-power tools, hydraulic tools, portable saws, power-generators, ropes, webbing;

Perform ventilation or entry procedures by opening walls and other structures with hand or power tools;

Raise, lower, and climb ladders to access buildings or rescue persons; make forcible entry into burning buildings;

Provide medical aid to injured persons according to scope of practice that is allowed by local Emergency Medical Services or departmental authority;

Operate emergency medical equipment;

Perform salvage and overhaul procedures to protect property;

Participate in drills, demonstrations, and courses in firefighting techniques, medical aid, heavy rescue, hazardous materials, equipment maintenance and related areas;

Study local conditions and factors affecting fire operations;

Study departmental policy and safety procedures;

Study inspection regulations and prevention rules;

Maintain physical fitness and health;

Inspect business occupancies and perform follow-up procedures to ensure compliance to Fire Codes, National Electric Code, Uniform Building Codes, and state, local, and regional codes;

Participate in local school fire prevention programs by presenting or preparing presentations;

Perform station tours and other public education activities to promote fire safety and public awareness; and

Complete appropriate paperwork.

See Job Duties (of Austin Fire Department firefighters), https://joinafd.com/job-duties (last accessed on July 17, 2019).

None of these job-duties of regular firefighters are law-enforcement related. Firefighters in Texas do **not** investigate arsons, deaths, crimes, suspected crimes, or perform any other law-enforcement function that peace officers (including fire marshals) do.

Appellant's position comports with existing Supreme Court law. The opinion observed that under *Clifford*, 464 U.S. at 294, if evidence of criminal activity is discovered by "firefighters" during a lawful search under exigent circumstances, firefighters may seize it under the plain view doctrine. *Martin*, *id*. at *8-9. The Opinion phrased this as though the "firefighters" in Clifford were **no** different than Cook and the other firefighters at Appellant's apartment.

However, this was **not** what happened in *Clifford*, and regular firefighters had **nothing** to do with the investigation or seizure of contraband. After the home in *Clifford* was damaged by a fire, regular firefighters extinguished the blaze and then left the premises. *Id*. at 289-290. **Five hours later**, **arson investigators** arrived at the home to **investigate** the cause of the blaze. *Id*. at 290. The investigators entered the home and conducted an extensive search without obtaining consent or an administrative warrant. *Id*. Their search and investigation determined that the fire

had been caused by an incendiary device made up of a crock-pot with attached wires leading to an electrical timer that was plugged into an outlet and was thus set deliberately. *Id*. The investigators seized the evidence and extended their search to other areas of the home where they found additional evidence of arson. *Id*. There were **no** exigent circumstances justifying a warrantless search. *Id*. at 291, 297-298. And, the SCOTUS refused to exempt from the warrant-requirement administrative investigations into the cause and origin of a fire, holding that the only evidence that is exempt from the warrant-requirement is what was found in the home's ***driveway***. *Id*. at 298-299.

Thus, *Clifford* in fact shows that if **arson investigators** (who would be law enforcement or fire marshals in Texas) are unable to enter a home without a warrant if there are no exigent circumstances, then a regular firefighter cannot spot what appears to be contraband, tell a peace officer about it, and enable the peace officer to enter the home without a warrant.

There are three types of exigent circumstances that justify a warrantless intrusion, none of which apply in this case: (1) providing aid or assistance to persons whom law enforcement officers reasonably believe need assistance; (2) protecting police officers and others from persons whom they reasonably believe to be present, armed, and dangerous; and (3) preventing the destruction of evidence or contraband. *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex.Crim.App. 2007). There is **no** evidence

that by entering Appellant's home without a warrant that Hart was: (1) providing aid or assistance to persons whom law enforcement officers reasonably believe need assistance; (2) protecting officers and others from persons Hart reasonably believe to be present, armed, and dangerous; or (3) preventing the destruction of evidence or contraband.

Specifically here, Cook and other firefighters did **not** tell Hart that the evidence that Cook observed needed to be saved from destruction. Thus, unless there is a bona fide exigent circumstance, if a peace officer obtains information about contraband inside a home from a firefighter, although the peace officer may use the information to obtain a warrant to search the home, the peace officer should be **prohibited** from entering the home without a warrant to seize evidence. In other words, what the firefighter learns inside the home does **not** "impute" to a peace officer who otherwise has no right to enter the home without a warrant.

> **Merely because a firefighter has lawfully entered a home to put out fires or save lives does not create a permanent license for "any sort of public officer [to] thereafter invade his home"**

The Opinion also discussed a "second rationale" that "…simply because a fire official has lawfully entered, this should not create a permanent license for 'any sort of public officer [to] thereafter invade his home.'" *Martin*, *id*. at *12. The Opinion continued, surmising that:

> "[H]owever, this limitation was not exceeded here. Firefighters were on the scene working when…Hart arrived, and they asked him to secure the apartment. When…Hart's initial investigation concluded two minutes later, firefighters remained on the scene waiting for his report. Though the fire had subsided, the aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant…The same exigency continued for a reasonable time to allow firefighters to complete their duties, and it was within this window that…Hart conducted his investigation."

Martin, *id*. at *12-13. However, this is **not** what occurred. Hart and other officers did nothing at the scene that aided the firefighters. In fact, the officers and firefighters did not speak to each other. The firefighters continued their work while the officers conducted a search of the apartment. As the testimony showed (RR.53):

> **Question:** Did you ever tell the fire--fire department, firefighters, the battalion chief, did you -- at any point, did you tell them, I've secured the scene, you're good to go, continue ventilating?
>
> **Hart:** No, sir, I didn't say that.
>
> **Question:** During those two minutes, did you secure or clear any of the firearms?
>
> **Hart:** No, sir, I did not.
>
> **Question:** At that point, did you seize any of the paraphernalia?
>
> **Hart:** No, sir.

As the Opinion even conceded, simply because a firefighter has lawfully entered a home does not create "a permanent license" for "any sort of public officer [to] thereafter invade" a person's home. Cook admitted that they would **not** have let the officers in the apartment until it was "all clear." (RR.23).

None of the cases cited by the Opinion supports its conclusions. Now had Hart entered when exigent circumstances existed and seen the contraband, Hart would **not** have needed a warrant to seize it. For instance, in *State v. Lewis*, 171 P.3d 731 (Mont. 2007), a neighbor reported smoke coming from Lewis's apartment. *Id*. at 733. Officer McCord was the first to respond to the fire. *Id*. McCord asked the neighbor where the fire was and she directed him to the back of the structure. *Id*. Through a window, McCord observed flames behind a wood stove in Lewis's apartment and matchbooks with cigarettes in them on a table near the stove. *Id*. McCord entered the apartment to extinguish the fire. *Id*. at 734 Then McCord reentered to take photos of the fuses that he saw on his initial entry before seizing them, which he did on that second entry. Finally, McCord reentered to obtain more evidence. *Id*.

The Montana Supreme Court held that the evidence seized was observed by the officer in plain view and the second entry into the apartment to photograph and seize evidence was justified by exigent circumstances (preventing destruction of evidence). *Id*. at 738-739. But the third entry into the apartment warranted suppression of the evidence that McCord seized during that entry because there were **no** exigent circumstances at that point. *Id*. at 739.

Unlike the situation in Lewis, Hart was **not** the first person to arrive at Appellant's apartment. Hart's warrantless entry into Appellant's apartment was not

to secure evidence that could be destroyed by the fire (or otherwise destroyed or hidden). Instead, Hart admitted (RR.49) that his entry into Appellant's apartment based on a "protective sweep" that in fact was illegal because Appellant had **not** been arrested yet and the apartment clearly was not harboring a person posing a danger to those on the arrest scene. *Reasor*, 12 S.W.3d at 815-817.

IX. Conclusion and Prayer

The Court of Appeals erred by affirming the Judgment and sentence, and: (1) decided an important question of state and federal law that has not been but should be settled by this Court; and (2) decided an important question of state or federal law in a way that conflicts with the applicable decisions of this Court and the Supreme Court. *See* Tex. Rule App. Proc. 66.3(b) & (c) (2019). Appellant prays that the Court grant discretionary review, reverse the Opinion, and remand for a new trial.

Respectfully submitted,

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Appellant
Lead counsel of record

/s/ Michael Mowla
Michael Mowla

Gregg Gallian
Gallian Defense Firm LLC
2001 Bryan Street Suite 1905
Dallas, TX 75201
Phone & Fax: 214-433-6303
Gregg@GallianDefenseFirm.com
Texas Bar No. 24085952
Attorney for Appellant

/s/ Gregg Gallian
Gregg Gallian

Lukas Z.S. Garcia
Crain Lewis Brogdon, LLP
3400 Carlisle Street, Suite 200
Dallas, TX 75204
Phone: 214-522-9404
Fax: 214-969-5522
LGarcia@crainlewis.com
Texas Bar No. 24100578
Attorney for Appellant

/s/ Lukas Z.S. Garcia
Lukas Z.S. Garcia

X. Certificate of Service

I certify that on July 17, 2019, a copy of this document was served on the Tarrant County District Attorney's Office, Appellate Division, by efile to COAappellatealerts@TarrantCountytx.gov; and on the State Prosecuting Attorney by efile to stacey.soule@spa.texas.gov, john.messinger@spa.state.tx.us, and information@spa.texas.gov. *See* Tex. Rule App. Proc. 9.5 (2019) and Tex. Rule App. Proc. 68.11 (2019).

/s/ Michael Mowla
Michael Mowla

XI. Certificate of Compliance with Tex. Rule App. Proc. 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does **not** exceed 4,500 words. Using the word-count feature of Microsoft Word 2016, this document contains **3,731** words **except** in the following sections: caption; identity of parties, counsel, and judges; table of contents; table of authorities; statement regarding oral argument; statement of the case, procedural history, and statement of jurisdiction; statement of issues presented (grounds for review section); signature; certificate of service; certificate of compliance; and the appendix; and (2) the typeface requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2019).

/s/ Michael Mowla
Michael Mowla

Appendix

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00333-CR

CASEY ALLEN MARTIN, Appellant

V.

THE STATE OF TEXAS

On Appeal from Criminal District Court No. 1
Tarrant County, Texas
Trial Court No. 1515753D

Before Kerr, Birdwell, and Bassel, JJ.
Opinion by Justice Birdwell

OPINION

A fire broke out in appellant Casey Allen Martin's apartment, and firefighters entered to battle the blaze. Firefighters saw drug paraphernalia inside, and they called police in to observe the scene. Officers then obtained a search warrant, which led to the discovery of the methamphetamine that was the basis for Martin's conviction.

In one issue, Martin appeals the denial of his motion to suppress. Martin does not dispute that the fire permitted firefighters to enter the apartment. But he contends that the same exigent circumstances did not also authorize officers to enter and observe, in plain view, the same contraband that firefighters had already seen. Because we disagree, we affirm.

I. Background

On August 30, 2017, at approximately 10:47 p.m., the Bedford Fire Department ("BFD") was called to a fire at an apartment complex.[1] Firefighter Darren Cook located the source of the fire as an apartment on the second floor, with smoke and water flowing from the door. Cook contacted the tenant, Martin, who indicated that he fell asleep while cooking on the stove.

BFD made entry and extinguished a small fire on the cooktop. Cook then began efforts to ventilate the apartment. Cook attempted to open a window in the

[1]We draw our recitation of the facts from the trial court's findings, which are reasonably supported by the record. *See State v. Kerwick*, 393 S.W.3d 270, 274 (Tex. Crim. App. 2013).

back bedroom, kneeling on a futon to reach the window, and his knee touched a firearm. Cook became concerned about his safety and the safety of the other firefighters. The firefighters began to look around the apartment and observed other firearms and ammunition scattered throughout the apartment, giving Cook additional safety concerns. Cook also saw multiple items of drug paraphernalia sitting on dressers, tables, and a shelf in an open closet—all in plain view. Cook decided to call the police due to his safety concerns and the drug paraphernalia.

Officer Hunter Hart of the Bedford Police Department was dispatched to the scene. When Officer Hart arrived, he made contact with the BFD battalion chief. The chief told Officer Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and that BFD had located guns and drug paraphernalia inside the apartment. The chief told Officer Hart that he was concerned about the safety of BFD due to what they had observed, and he wanted Officer Hart to secure the apartment.

Officer Hart went into the apartment and inspected each room, ending with the back bedroom. In the bedroom, he observed drug paraphernalia in plain view. Officer Hart described the paraphernalia as a pipe or bong containing drug residue, a plastic baggie containing drug residue, and additional plastic baggies commonly used to contain narcotics. Based on the items of drug paraphernalia, Officer Hart believed that an offense had been committed, and he "froze" the apartment as a crime scene. Officer Hart exited the apartment approximately two minutes after his initial entry

and determined that there was no one inside who could pose a safety risk. BFD remained at the scene while Officer Hart entered and exited the apartment.

Additional officers went into the apartment to observe the contraband and to determine if they should obtain a search warrant for the apartment. The police did not seize any evidence at that time. The officers talked to Martin, who stated that he was the only one residing in the apartment. Martin was arrested for possession of drug paraphernalia.

Officer Hart then left the scene, and Bedford police obtained a search warrant at 3:12 a.m. on August 31, 2017. In the warrant affidavit, an officer alleged that Cook and BFD had located what they believed to be drug paraphernalia inside the residence. Police executed the search warrant and found the methamphetamine that is the subject of this case.

After hearing the evidence, the trial court denied suppression and entered findings of fact and conclusions of law. In its conclusions, the trial court stated that the firefighters' entry into the apartment was lawfully related to exigent circumstances: combatting an ongoing fire. The trial court observed that under Supreme Court precedent, the firefighters would have been within their rights to seize the drug paraphernalia that they saw in plain view.

The trial court also concluded that Officer Hart's entry was justified, though it noted that the Texas Court of Criminal Appeals had yet to address this issue. The trial court reasoned that firefighters should be permitted to call on officers to secure

the scene of a fire and to observe, in plain view, the same evidence that firefighters were entitled to seize. As support, the trial court cited cases from several other jurisdictions, and it noted that "the overwhelming majority of courts that have addressed this issue have concluded that the police may step into the shoes of the firefighter to seize the contraband without first obtaining a warrant." The trial court concluded that because both Cook's and Officer Hart's entries into the apartment were lawful under the Fourth Amendment, suppression should be denied.

Following denial of suppression, Martin pleaded guilty to possession of methamphetamine. The trial court deferred adjudication and placed Martin on community supervision for a period of seven years. Martin appeals the trial court's ruling, which we now consider. *See* Tex. R. App. P. 25.2(a)(2)(A).

II. Discussion

Martin contends that the trial court erred by denying his motion to suppress.[2] Martin does not dispute that exigent circumstances permitted the firefighters' entry into the apartment and their efforts to control the fire. But he asserts that the same circumstances did not validate Officer Hart's entry, especially because the fire was doused before he arrived. Martin submits that despite the testimony regarding firearms, contraband, and the firefighters' safety concerns, there was no realistic

[2]To begin with, Martin offers three propositions that the State does not contest: (1) that even after the fire, he maintained a reasonable expectation of privacy in the apartment; (2) that the protective sweep doctrine does not apply; and (3) that he never provided consent to search his apartment. Because these arguments are not dispositive or contested, we do not address them further.

indication that some other form of exigency was afoot, such as an armed confrontation. Martin contends that because any remaining exigency was extinguished with the last flames, the officer's entry was unlawful. And because the entry was unlawful, Martin reasons, the methamphetamine must be suppressed as the fruit of an illegal search.

In response, the State asks us to adopt the rule applied by courts in many other jurisdictions: where a lawful intrusion by a firefighter has already occurred, and the firefighter has already observed contraband in plain view, the invasion of privacy is not increased by allowing an officer to enter the residence and observe or seize the contraband. We will oblige the State's request.

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Lerma v. State*, 543 S.W.3d 184, 189–90 (Tex. Crim. App. 2018). At a motion to suppress hearing, the trial judge is the sole trier of fact and judge of credibility of witnesses and the weight to be given to their testimony. *Id.* at 190. Therefore, we afford almost complete deference to the trial court in determining historical facts. *Id.* When a trial judge makes express findings of fact, an appellate court must examine the record in the light most favorable to the ruling and uphold those fact findings so long as they are supported by the record. *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017). The appellate court then proceeds to a de novo determination of the legal significance of the facts as found by the trial

court—including the determination of whether a specific search or seizure was reasonable. *Id.*

The Fourth Amendment provides 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. In *Michigan v. Tyler*, the United States Supreme Court concluded that the protection against unreasonable search and seizure applies to fire officials. 436 U.S. 499, 509–10, 98 S. Ct. 1942, 1950 (1978).

The ultimate touchstone of the Fourth Amendment is "reasonableness." *Fernandez v. California*, 571 U.S. 292, 298, 134 S. Ct. 1126, 1132 (2014). A warrantless police entry into a person's home is presumptively unreasonable unless it falls within the scope of one of a few well-delineated exceptions to the warrant requirement. *Turrubiate v. State*, 399 S.W.3d 147, 151 (Tex. Crim. App. 2013); *Johnson v. State*, 226 S.W.3d 439, 443 (Tex. Crim. App. 2007). This general rule applies equally to fire-damaged property "unless the fire is so devastating that no reasonable privacy interests remain in the ash and ruins." *Garrison v. State*, Nos. 2-04-450-CR, 2-04-451-CR, 2005 WL 1594258, at *2 (Tex. App.—Fort Worth July 7, 2005, pets. ref'd) (not designated for publication).

One well-recognized exception 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. *Missouri v. McNeely*, 569 U.S.

141, 148–49, 133 S. Ct. 1552, 1558 (2013); *see Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). "A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home . . . or enter a burning building to put out a fire and investigate its cause." *McNeely*, 569 U.S. at 149, 133 S. Ct. at 1558–59. Moreover, the exigent circumstances created by a fire are not extinguished the moment the fire is put out. *See Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950; *Johnson*, 226 S.W.3d at 446 n.29. Rather, "the exigent circumstances warranting intrusion by government officials continue for a reasonable time after the fire has been extinguished to allow fire officials to fulfill their duties, including making sure the fire will not rekindle, and investigating the cause of the fire." *Jones v. Commonwealth*, 512 S.E.2d 165, 168 (Va. Ct. App. 1999) (citing *Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950). The determination of what constitutes a reasonable time to investigate varies according to the circumstances of a particular fire. *Tata v. State*, 446 S.W.3d 456, 467 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing *Tyler*, 436 U.S. at 510 n.6, 98 S. Ct. at 1950 n.6).

If evidence of criminal activity is discovered by firefighters during the course of a lawful search under exigent circumstances, firefighters may seize it under the plain view doctrine. *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S. Ct. 641, 647 (1984).

Three requirements must be met to justify the seizure of an object in plain view: (1) law enforcement officials must lawfully be where the object can be "plainly viewed"; (2) the "incriminating character" of the object in plain view must be "immediately apparent" to the officials; and (3) the officials must have the right to access the object. *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013).

Here, it is undoubted that the firefighters' entry into and conduct within the apartment was permissible under the Fourth Amendment. The exigency of the fire gave the firefighters passage into Martin's apartment. That exigency continued for a reasonable time after the fire had been extinguished to allow Cook and other firefighters to fulfill their duty to ventilate the apartment and to ensure the fire was out for good. *See Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950. While ventilating the apartment, Cook encountered contraband in plain view. Therefore, Cook certainly could have seized the paraphernalia and taken it to the police station, or simply handed it to officers outside the apartment. *See Clifford*, 464 U.S. at 294, 104 S. Ct. at 647.

The question remains whether the officers' entry also passes constitutional muster. "Of those jurisdictions that have considered the question, a majority has held that law enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel, at least if the exigency is continuing and the emergency personnel are still lawfully present." *State v. Bower*, 21 P.3d 491, 496 (Idaho Ct. App. 2001), *abrogated in part on other grounds by State v. Islas*,

No. 45174, 2019 WL 1053379, at *6 (Idaho Ct. App. Mar. 6, 2019); *see Steigler v. Anderson*, 496 F.2d 793, 797–98 (3d Cir. 1974); *United States v. Green*, 474 F.2d 1385, 1390 (5th Cir. 1973); *Mazen v. Seidel*, 940 P.2d 923, 927–28 (Ariz. 1997); *People v. Harper*, 902 P.2d 842, 846 (Colo. 1995); *State v. Eady*, 733 A.2d 112, 123 (Conn. 1999) (op. on reh'g); *Hazelwood v. Commonwealth*, 8 S.W.3d 886, 887 (Ky. Ct. App. 1999); *Commonwealth v. Person*, 560 A.2d 761, 765 (Pa. Super. Ct. 1989); *Jones*, 512 S.E.2d at 168–69; *State v. Bell*, 737 P.2d 254, 259 (Wash. 1987), *abrogated in part on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990).

In our view, such a rule is well founded. "Police officers often fill many roles, including paramedic, social worker, and fire investigator." *Mazen*, 940 P.2d at 928. When those roles overlap the role of criminal investigator, it is not unreasonable to allow officers "to step into the shoes of" the firefighter to observe and to seize the contraband without first obtaining a warrant. *Id.* Allowing this limited entry by an officer constitutes no greater intrusion upon the defendant's privacy interest than does a firefighter's entry. *Green*, 474 F.2d at 1390; *Eady*, 733 A.2d at 120; *Bower*, 21 P.3d at 496; *Jones*, 512 S.E.2d at 168. Under such circumstances, it would impose needless inconvenience and danger—to the firefighter, the officer, and the evidence—to require suspension of activity while a warrant is obtained. *Eady*, 733 A.2d at 120. Firefighters' efforts are best devoted to fighting fire and sorting the aftermath, which are within their mission and core expertise. When, as here, the presence of firearms

and contraband distracts from that mission, firefighters should be permitted to call upon police, whose expertise includes handling firearms and securing contraband.[3]

We note that a contrary rule is stated by two courts: *United States v. Hoffman*, 607 F.2d 280, 283–85 (9th Cir. 1979), and *State v. Bassett*, 982 P.2d 410, 419 (Mont. 1999). These courts held that firefighters may not call police into the scene of a fire to witness or seize contraband without first observing the warrant requirement.

As support, these courts offered two rationales. First, these courts rejected the notion that a police officer may legitimately "step into the shoes" of a firefighter because the firefighter and the police officer entered burned houses for two entirely separate reasons. *See, e.g.*, *Bassett*, 982 P.2d at 418. The firefighters entered the home to extinguish the fire, to clean up, and to ensure that the fire did not reignite. *Id.* But the police officer entered solely to seize criminal evidence unrelated to the fire. *Id.* The *Bassett* court held that because there were "two separate reasons for entering the house, . . . there thus must be two entirely separate justifications for each entry." *Id.*; *see Hoffman*, 607 F.2d at 284–85 (concluding that an officer's entry was not a "mere extension" of the firefighter's entry in part because the officer's "only purpose in entering appellant's trailer . . . was to seize evidence of an unrelated federal crime").

We disagree with this line of reasoning. It is well established that an officer's subjective reasons for acting are irrelevant in determining whether that officer's

[3]This cause presents an even stronger case for the application of the majority rule, for in addition to contraband, firefighters faced safety concerns from the presence of several firearms.

actions violate the Fourth Amendment. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948 (2006). "[T]he issue is not his state of mind, but the objective effect of his actions . . . ." *Id.* at 398, 126 S. Ct. at 1948 (quoting *Bond v. United States*, 529 U.S. 334, 338 n.2, 120 S. Ct. 1462, 1465 n.2 (2000)). Because this rationale would instead make an officer's subjective motivation a paramount concern, we must respectfully part ways with our brethren in Montana and the Ninth Circuit.

As a second rationale, these courts have emphasized that simply because a fire official has lawfully entered, this should not create a permanent license for "any sort of public officer [to] thereafter invade his home." *Hoffman*, 607 F.2d at 285; *see Bassett*, 982 P.2d at 417. We agree with this logic, which under the majority rule has been fashioned into a limitation forbidding subsequent searches after police and fire officials have left the scene. *See Clifford*, 464 U.S. at 293, 104 S. Ct. at 647; *Mazen*, 940 P.2d at 928; *Bower*, 21 P.3d at 497; *cf. Bray v. State*, 597 S.W.2d 763, 768 (Tex. Crim. App. [Panel Op.] 1980) (holding that warrantless search of apartment's bathroom conducted by police officer, who entered premises after fire department personnel informed officer that there was no immediate danger and left the scene, was not justified by emergency doctrine).

However, this limitation was not exceeded here. Firefighters were on the scene working when Officer Hart arrived, and they asked him to secure the apartment. When Officer Hart's initial investigation concluded two minutes later, firefighters remained on the scene waiting for his report. Though the fire had subsided, the

aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant. *Clifford*, 464 U.S. at 293, 104 S. Ct. at 647. The same exigency continued for a reasonable time to allow firefighters to complete their duties, and it was within this window that Officer Hart conducted his investigation. *See Tyler*, 436 U.S. at 510, 98 S. Ct. at 1950.

Nor did Officer Hart violate another limitation: multiple courts have held that when an officer steps into a firefighter's shoes, the officer must not exceed the boundaries of the original entry or undertake a general search of the premises. *See Mazen*, 940 P.2d at 929; *Eady*, 733 A.2d at 120; *Bower*, 21 P.3d at 497; *Jones*, 512 S.E.2d at 169; *Bell*, 737 P.2d at 259. During Officer Hart's initial entry, he surveyed the main areas of the apartment and opened a hallway door. He then proceeded to the back bedroom to observe the paraphernalia in plain view, just as the firefighters had done, and he exited the apartment just as quickly as he entered. Thus, he remained within the bounds of the firefighters' original entry.

Because the officer's intrusion did not exceed that of the emergency personnel who were still on the scene, Martin suffered no additional injury to his privacy interest due to the officer's entry. *See Bower*, 21 P.3d at 497. Therefore, Officer Hart "cannot be constitutionally tripped up at the threshold"; he must be allowed to step into Cook's shoes and make the same plain-view observation that Cook was entitled to make. *See Eady*, 733 A.2d at 122 n.16 (quoting *Green*, 474 F.2d at 1390). We conclude

that Officer Hart's entry into the apartment was lawful under the Fourth Amendment. We therefore overrule Martin's first and only issue.

III. Conclusion

We affirm the judgment of the trial court.

/s/ Wade Birdwell

Wade Birdwell
Justice

Publish

Delivered: May 16, 2019

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00333-CR

CASEY ALLEN MARTIN, Appellant	§	On Appeal from Criminal District Court No. 1
	§	of Tarrant County (1515753D)
V.	§	May 16, 2019
	§	Opinion by Justice Birdwell
THE STATE OF TEXAS	§	(p)

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in the trial court's judgment. It is ordered that the judgment of the trial court is affirmed.

SECOND DISTRICT COURT OF APPEALS

By /s/ Wade Birdwell
Justice Wade Birdwell