No. _____

In The Supreme Court of the United States

JOHN GERARD QUINN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner John Quinn was shot during a no-knock entry of his home while police were executing a search warrant related to Petitioner's son. The police failed to knock and announce before storming the residence even though the magistrate did not approve a no-knock entry; the police admitted the sole justification for the unannounced raid was their suspicion that occupants of the home might be in possession of a rifle. At trial, Petitioner was convicted of possession of less than a gram of cocaine even though the jury instructions only required the jury to find one element of the two elements required to prove possession under Texas law.

The questions presented in this Petition are:

1. Did the Texas courts commit Constitutional error by holding that the suspected possession of a firearm in a residence constitutes an "exigent circumstance" that this Court says must be present before police may lawfully execute a no-knock entry of a residence?

2. Did the Texas courts violate the U.S. Constitution's guaranties of due process of law and trial by jury by upholding a conviction based on a jury charge that did not require the jury to find ***both*** essential elements of the offense charged?

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OPINIONS BELOW

The Dallas Court of Appeals' opinion and order dated May 17, 2013, affirming the District Court judgment, is unreported and is set forth in the Appendix at App. 2a to 14a. The Texas Court of Criminal Appeals' order denying review of the Court of Appeals' opinion and order is unreported, was entered September 25, 2013, and is set forth in Appendix at App. 1a.

STATEMENT OF JURISDICTION

The judgment of the Texas Court of Criminal Appeals, the highest state court in Texas for criminal matters, denying further review of the Dallas Court of Appeals' ruling, was entered on September 25, 2013. App. 1a. This Court has jurisdiction over this Petition under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 4 provides:

> The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. 6 provides in relevant parts:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

> district shall have been previously ascertained by law[.]"

U.S. Const. amend. 14, §1 provides, in relevant parts:

> "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Tex. Health & Safety Code § 481.115(a) provides:

> Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

Tex. Penal Code § 6.01 provides:

> (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
> (b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his

> control of the thing for a sufficient time to permit him to terminate his control.
> (c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

Tex. Penal Code § 6.03 provides in relevant parts:

> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

STATEMENT OF THE CASE

Factual History

During a midnight SWAT raid of his home in 2006, Petitioner was arrested for possession of less than a gram of cocaine. The cocaine was found in a locked safe in Petitioner's master bedroom closet which police searched after they had shot him during the botched raid. Petitioner's 22-year-old son Brian was living in the residence when the raid took place.

Brian had a long history of drug abuse but never violence. As any good father would do in similar circumstances, Petitioner was trying to help Brian kick his drug habit, which he believed could be better accomplished if Brian was living close to him and thus subject to supervision and accountability. Petitioner was not mentioned in the search warrant or supporting affidavit as either suspected of drug possession or as being dangerous in any way; he was mentioned only as the owner of the home.

At Petitioner's trial, Brian – now 27, and even though under indictment himself – testified that the cocaine was his and that it had probably been found by his father after Brian misplaced it. 9RR65[1] Brian praised his father for his fearless assistance in helping him overcome his drug habit, and also testified that part of that assistance meant his father would sometimes confront him when he found suspicious things in or around the house. Brian testified that his father never used drugs, and that the baggie was probably in his dad's safe awaiting another such confrontation. 9RR66-67

After the police shot him, Petitioner was transported to the hospital for treatment of his gunshot wound. While in the hospital, Petitioner did not test positive for any drugs, which is consistent with Brian's testimony that his father never used drugs.

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[1] "RR" references are to the volume-RR-page of the Reporter's Record, and "CR" references the Clerk's Record, in the October 2011 trial.

Procedural History

After waiting five years, Petitioner was finally brought to trial in Texas District Court on a charge of possession of less than a gram of cocaine, Tex. Health & Safety Code § 481.115(a). Prior to and during trial, Petitioner moved to suppress the evidence found in the locked safe in his bedroom, asserting that the failure of police to knock and announce their presence before storming into Petitioner's home to execute the search warrant violated the prohibition on unreasonable searches and seizures contained in U.S. Const. amend. 4. App. 3a, The trial court denied the motion and the small quantity of cocaine found in the safe, the only evidence of Petitioner's guilt, was admitted into evidence at trial.

The trial court also instructed the jury as follows with respect to the offense on which the Petitioner was convicted:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of August, 2006, in Collin County, Texas, the defendant, **JOHN GERARD QUINN**, did then and there intentionally and knowingly possess a controlled substance, namely: cocaine, in the amount of less than one (1) gram, by aggregate weight, including adulterants and dilutants, then you will find the defendant guilty as charged.

App. 16a. After beginning deliberations, the jury sent the following note to the judge:

> In the 8th paragraph of cause 429-81971-09 it states:
> A person commits an offense only if he voluntarily engages in conduct, including an act, and omission, or possession. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.
> The Question: Does the possessor have to know the thing is illegal.

App. 32a. In response to this question, the defense urged the court to respond "yes." 10RR236. The prosecutor asked the court to tell the jury *incorrect* law by answering the question "no." *Id.* Without consensus from counsel, the trial court responded to the jury as follows: "You have all the law and the evidence. Continue to deliberate." *Id.*

The jury found Petitioner guilty of possession of cocaine and the trial court entered judgment on that verdict sentencing Petitioner to 180 days confinement (which was suspended), two years of community supervision, and a $500 fine. Petitioner timely appealed the judgment to the Court of Appeals of Texas.

In the Court of Appeals, Petitioner claimed that the trial court erred in denying his motion to

suppress, urging that the search violated the Fourth Amendment's requirement that police knock and announce before entering a dwelling to execute a search warrant. Although the Court of Appeals acknowledged the requirement, it noted that police need not announce their presence and purpose if circumstances indicate a threat of physical violence or that evidence might be destroyed. App. 6a-7a. Pointing to evidence that Brian kept a number of guns, the Court of Appeals concluded that "the officers' knowledge that guns, . . ., were likely to be on the premises to be searched made the no-knock entry reasonable under the circumstances." App. 8a. The Court of Appeals went on to rule that even if it found a Fourth Amendment violation, suppression of the evidence was not required under a Texas' suppression statute because there was no causal connection between the no-knock entry and the discovery of the cocaine. App. 9a.

Petitioner also argued in the Court of Appeals that the evidence was insufficient to support the essential element that he knew the substance found in the safe was cocaine and that the charge was defective. However, the Court ruled that the jury could have inferred that Petitioner knew the substance "had some value" because he had placed it in a locked safe. "A rational juror could certainly have concluded [Petitioner] knew what was in the bag was contraband." App. 11a. In connection with this allegation of error, Petitioner also claimed that the trial court erred in its response to the jury's question about whether a defendant must know that the thing possessed is illegal. Again, however, the

Court of Appeals found no error and affirmed the judgment below. App 11a-13a.

Petitioner then sought discretionary review with the Texas Court of Criminal Appeals. In the petition to that court, Petitioner specifically asserted that the "no-knock" entry of police to execute the search warrant violated the Fourth Amendment, App. 34a, 36a-37a, and that the instruction given the jury was constitutionally deficient. App 34a-35a, 45a-46a. The Court of Criminal Appeals issued a summary order denying review, although Judge Meyer voted to grant review. App. at 1a.

REASONS FOR GRANTING THE WRIT

This case presents two separate issues. The first is whether police suspicion that occupants of a private residence are in possession of firearms is a sufficient "exigent circumstance" to overcome the knock-and-announce rule set forth in *Richards v. Wisconsin*, 520 U.S. 385 (1997). Collateral to this issue are two sub-issues: (a) whether violation of the knock-and-announce rule ***in this case*** triggers the exclusionary rule (federal or state); and (b) whether *Hudson v. Michigan*, 547 U.S. 586 (2006), was wrongly decided on a broader scale. Sub-issue (b) requires inquiry into the history of *Hudson* since 2005, the policy grounds used to support the majority in *Hudson*, and the practical, real-world consequences of separating the knock-and-announce rule from the exclusionary rule. Due to word limitations, much of the important briefing on sub-issue (b) will need to await briefs on the merits, and we believe that briefing will cause the Court to overrule *Hudson*.

The second issue is whether a criminal conviction may stand when the jury was only charged with finding one element of a two-element offense. Both *Francis v. Franklin*, 471 U.S. 307 (1987), and *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013), compel reversal of the Texas courts' conviction.

I. Texas courts have disregarded the Fourth Amendment's requirement that police have permission from a magistrate or exigent circumstances

before using a no-knock entry to execute a search warrant on a private residence.

A. The law requires a no-knock warrant or exigent circumstances before a no-knock entry of a residence will pass Constitutional muster.

A lawful search may only be conducted via no-knock entry in two circumstances:

(1) under the aegis of a no-knock warrant, *United States v. Banks*, 540 U.S. 31, 36 (2003), or

(2) when exigent circumstances lead police to conclude that knocking and announcing risks:
   (a) the safety of persons, or
   (b) impeding a criminal investigation, such as by allowing the destruction of evidence or escape of fleeing suspects.

Richards v. Wisconsin, 520 U.S. at 394 .

The suspected possession of firearms implicates the "safety" exception to the knock-and-announce rule, but even in that circumstance, the police must have grounds for believing their safety is at risk, not merely that instrumentalities on the premises could be used in a harmful manner. If the latter were the test, then police suspicion that

occupants have kitchen knives, baseball bats, drain cleaner, or rope – all of which are potentially-lethal objects – would suffice to justify a no-knock entry.

This is not a "slippery slope" argument; it is logic. The mere presence of firearms (or any other object) is no indication whatsoever that the person possessing them is going to use them to hurt anyone, and unless used in a harmful manner, inanimate objects – including firearms – are harmless. The suspected presence of firearms, therefore, cannot by itself justify police in believing their safety is in jeopardy.[2] Something more – something ***human*** – is required.

If police experience tells them that weapons are commonly found in drug houses but that knowledge is insufficient to create a "blanket exception" to the knock-and-announce rule (per *Richards*), how could police suspicion of a particular ***type*** of firearm (e.g., an AK-47) be considered the "particularized circumstance" required by the Constitution? Even more so: if the presence of armed bank robbers in a residence is not sufficient to justify a no-knock entry (again, per *Richards*), then why

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[2] Compare *Youngbey v. March*, 676 F.3d 1114, 1121 (D.C. Cir. 2012), in which the officers not only had suspicion of a weapon on premises, but also information that the occupant and subject of their search had recently killed someone, probably with the same rifle he now possessed. This particularized information was the "more" needed to justify a no-knock entry, and the DC Circuit correctly found.

would the presence of armed people who are not bank robbers do so? That makes no sense.

Rather, the particularized circumstance required by the Fourth Amendment is a circumstance supporting the belief that harm may actually be inflicted, not merely a belief that an instrument capable of inflicting harm is present. This requires evidence relating to ***people***, not inanimate objects. People, not objects, are dangerous. This is not in any way a frivolous distinction.[3] As one court pointed out:

> Police knowledge of the existence of a firearm excuses compliance with announcement requirements only where the officers reasonably believe the weapon will be ***used*** against them if they proceed with the ordinary announcements. ... This belief must be based on specific facts and not on broad, unsupported presumptions. ... It is no more acceptable to justify unannounced entry on the basis of a presumed presumption of firearm owners to ***shoot*** at approaching police officers in every case in which the police possess information that there are firearms at the location to be entered.

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[3] It also applies to the other exceptions to knock-and-announce. Except in the case of perishable substances, most forms of evidence do not destroy themselves without the assistance of ***people***, and obviously, human action is involved when ***people*** are fleeing the police.

People v. Dumas, 512 P.2d 1208, 1213 (Cal. 1973) (emphasis added).[4] Firearms do not operate themselves; a likelihood of danger thus only exists where the ***people*** involved are dangerous.[5] In *Dumas*, the unannounced entry was upheld based on the known proclivities of the home's occupant.

In *Bishop v. Arcuri*, 674 F.3d 456, 464 (5th Cir. 2012), the appellate court was concerned that the police – no doubt taking their cue from *Hudson* – viewed the no-knock entry as the "default" method of serving drug warrants: if the police did not have any information that suspects did ***not*** pose a threat to office safety, then a no-knock was used.

> Arcuri readily admits that he had no particularized basis for his safety

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[4] See also *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994) and *Poole v. U.S.*, 630 F.2d 1109 (D.C. Cir. 1993)(information that the ***people*** involved are dangerous required for no-knock entry; suspicion that weapons are on location is not enough).

[5] See *Gould v. Davis*, 165 F.3d 265, 272 (4th Cir. 1998) (raid conducted ***with*** a no-knock warrant still ruled in violation of 4th Amendment; emphasis added):

> We think a reasonable officer would have known that guns do not fire themselves, and that a justifiable fear for an officer's safety must include a belief, not simply that a gun may be located within a home, but that ***someone*** inside the home might be willing to use it.

> concerns because he mistakenly asserts that the general dangerousness of drug-related criminals is sufficient justification for conducting a no-knock entry.

Such backwards thinking will undoubtedly become standard police procedure if the Court rejects this Petition and finds mere "suspicion of firearms" sufficient to justify a no-knock entry. After all, if no-knock entries are thought to be "safer" for police than knocking and announcing, what could possibly incite police to ***ever*** knock? Safety can only be endangered by dangerous ***people***. As held in *Bishop*, 674 F.3d 454 (emphasis added):

> In each case [where justification was found], the police knew the identity of the ***occupant*** of the dwelling they entered and had specific information indicating that ***the person*** might be dangerous. Arcuri, on the other hand, made a no-knock entry into a house when he had admittedly not established who was home and had no specific information that ***the inhabitants*** were dangerous.[6]

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[6] We now have a situation in Texas where, depending on whether the defendant is prosecuted in state or federal court, a different rule applies regarding the legitimacy of a no-knock entry, even though the same Fourth Amendment controls both situations.

In this case, the police had no evidence that any occupant of Petitioner's home was dangerous or might harm them.[7] The only weapons found in Petitioner's home were lawfully owned, and all but one of them, which Petitioner kept in his nightstand for personal protection per *District of Columbia v. Heller,* 554 U.S. 570 (2008), were found safely locked inside steel safes.

More disturbingly, the police knew Petitioner held a concealed handgun license (CHL). To get a CHL, applicants must – like police officers – (a) pass criminal background checks, (b) pass firearms proficiency exams, and (c) be approved by the government. Holders of CHL's are some of the most highly-vetted firearm owners.

Since all law enforcement agencies have access to the names of everyone with a CHL, a stunning irony arises: under the reasoning implicit in the

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[7] The Court will note that nowhere in the warrant affidavit does the affiant claim that either Brian Quinn or Petitioner are dangerous or pose any risk of harming anyone. See CR46-49, 167-171. Indeed, even in his boilerplate list of characteristics of drug dealers, officer Grollnek does not claim that drug dealers are ***generally*** dangerous or pose any risk of harm to the police. See *State v. Barnett*, 722 S.E.2d 865 (Ga. Ct. App. 2012). Compare this to the evidence that ***did*** justify issuance of a no-knock warrant in *U.S. v. Wardrick*, 350 F.3d 446 (4th Cir. 2003): that the ***person*** subject of the warrant had a violent criminal history, including battery while resisting arrest. See Radley Balko, "Rise of the Warrior Cop: The Militarization of America's Police Forces," p. 327 (Public Affairs 2013)(drug dealers are not generally dangerous).

decisions below, if police are going to serve a warrant on a home and they know that an occupant has a CHL, this gives the police ***more reason*** to use a SWAT team to serve the warrant. This in turn means that all law-abiding, tested, trained, and state-vetted CHL holders are now at ***higher*** risk of a SWAT raid than their neighbors simply because they have, by becoming licensed to legally carry a firearm, informed the authorities that they are likely to be armed. But anyone who takes the time and passes all the tests and background checks to get a CHL (as did the Petitioner) is probably among the ***least-dangerous*** of all citizens when it comes to firearms.[8] One would think this would make the police ***less*** concerned for their safety. The obtuseness of the "presence of firearms" argument is thus brought into clear focus: the mere presence of a firearm does not put the police in greater danger; it is only the dangerous nature of the ***people*** involved that could possibly do that.

That the suspected possession of weapons was the only "justification" for use of a no-knock entry is undisputed. Sergeant Ellenburg, the detective in charge, was the only witness to testify about the reason for the SWAT raid. He testified that the suspected rifle is the ***only*** thing that supposedly

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[8] At least one court has held that resident's possession of a concealed handgun permit is insufficient to justify no-knock entry, finding that such a permit indicated a ***lesser*** chance of violence to the police. *Bellotte v. Edwards*, 629 F.3d 415 (4th Cir. 2011). The Court should make this common sense idea national policy: only if ***people*** are dangerous is no-knock force allowed.

created the "threat" justifying the SWAT raid (4RR205):

> Q (By Mr. Walker) And other than this alleged AK-47 rifle over here, was there any other threat that you were aware of to the officer's safety?
> A (By Sergeant Ellenburg) No, other than maybe – no, nothing.

This also is proven by the testimony of the SWAT team leader, Officer Guerrero. 5RR291-293 (there were no exigent circumstances at the scene). Additionally, the Court of Appeals opinion below cited the information regarding the presence of firearms as the sole justification for the no-knock execution of the warrant. App. at 7a-8a.

The Dallas Court of Appeals cited two Texas appellate opinions, *Stokes v. State,* 978 S.W.2d 674, 677 (Tex.App.-Eastland 1998, pet. ref'd) and *Klepper v. State,* 2003 WL 22663508 (Tex.App.-Dallas Nov.12, 2003, pet. ref'd), it claimed had found that suspected existence of firearms justified no-knock entries:

> Officers involved in the planning, preparation, and execution of the operation testified they believed the operation was high-risk ***because of the presence of guns on the premises.*** One officer testified the presence of an AK–47 particularly concerned the team, because the officers' body armor would not protect them from its shots. We

> conclude the officers' knowledge that guns, including the exceptionally dangerous AK–47, were likely to be on the premises to be searched made the no-knock entry reasonable under the existing circumstances.

App. 7a-8a (emphasis added).

This is absurd reasoning; if there are weapons on the premises sporting ammunition powerful enough to penetrate body armor, and the police fear the weapons may be used on them, rushing into the house will put police (not to mention every bystander within 800 yards of the event) into a ***higher risk*** situation, it will not help to protect them. Laying siege to such a location is the only rational alternative in that situation.

This Court has never held that suspected possession of a firearm is, without more, sufficient cause to justify a no-knock entry. This Court should instead correct the Texas state courts, which apparently believe mere lawful possession to be sufficient justification. Indeed, the result below was predicted and criticized by at least one legal scholar:

> It is only a matter of time before a plaintiff seeking to challenge a forced entry through a civil suit (or in the rare case, a defendant seeking suppression of evidence) will argue that the presence of a lawfully possessed firearm in the home could not permissibly be a factor in overcoming the knock-and-announce

> requirement. At the time of this writing, there appear to be no reported cases in which this argument has been made. It will happen. At that point, the federal courts (and potentially the Supreme Court) will need to adopt a framework for deciding whether the presence of a suspected firearm can justify a no-knock entry.

John D. Castiglione, *Another Heller Conundrum: Is it a Fourth Amendment "Exigent Circumstance" to Keep a Legal Firearm in Your Home?* 59 U.C.L.A. Rev. Discourse 230, 239 (2012).

Petitioner requests this Court issue a blanket, logical rule stating that suspected presence of firearms alone is never sufficient to overcome the knock-and-announce rule, and unless the police suspect that the ***persons*** involved might be dangerous, based on specific, articulable facts, then knock and announce is required under the Fourth Amendment.

B. Exclusion of evidence is required under the facts of this case, and to the extent Hudson v. Michigan would hold otherwise, that case should be overruled.

i. Federal Law.

From cases that pre-date *Hudson*, and despite part IV of *Hudson* (which is not the law), suppression is mandated by federal law under these facts. But for the SWAT entry, the police would never have

discovered the things contained in Petitioner's downstairs safes because the warrant was for Brian Quinn, and the police knew the materials they were searching for were in Brian's room, which police also knew was located in the ***upstairs*** part of the house.

If police had knocked and announced, they would have undoubtedly searched the portion of the house where the sole focus of their investigation was: the upstairs and Brian's living area. There, they actually found what they were looking for. It is simply not reasonable to believe that having found what they were looking for, in the location inside the house they suspected contained what they were looking for, with the person they suspected had the materials they were looking for, the police would have then "expanded" their search to the private effects of Petitioner (who was not implicated in any criminal activity) located in locked safes in the downstairs master bedroom closet that only Petitioner had access to.

The only reason an expanded, downstairs search was conducted was because the police had just shot Petitioner and they were desperate to find something – anything – with which to incriminate him as a deflection from their own illegal conduct; it was purely fortuitous that Petitioner had the baggie in his safe awaiting a discussion with his son. There is little question that the search of Petitioner's master bedroom closet was only conducted because the police had shot him, and that only happened due to the illegal no-knock entry into the premises. The required "but for" cause is therefore present in this case between the evidence seized and violation of the

knock-and-announce rule, and suppression is required.

ii. State Law.

Under current federal law, exclusion of evidence may not always be necessary when police violate the Fourth Amendment's knock-and-announce requirement. *Hudson*, 547 U.S. at 603-04 (2006) (Kennedy, J., concurring).[9] This new rule is terrible, but there is no "federal exclusionary" statute. Under federal law, the exclusionary rule is exclusively common law and can be mutated or dissolved by this Court using case law. *Weeks v. U.S.*, 232 U.S. 383 (1914). Not so in Texas.

In Texas, the exclusionary rule is statutory and requires suppression of evidence in every case in which the legal or Constitutional rights of the suspect are violated and the evidence is obtained thereby. Tex. Code Crim. P. art. 38.23 states in relevant part:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the

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[9] The dissent in *Hudson* makes a convincing case that the majority opinion pretty much guts the only thing keeping no-knock entries from becoming the norm in police work. After all, since it is supposedly "safer" (or maybe, more exciting) for police to use this method, why would they not do so in ***every*** case – unless it is legally discouraged? The ruling in this case could be used to walk back this hopefully-unintended consequence of the *Hudson* ruling.

> Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Petitioner's felony conviction thus potentially hinges on whether the police violated his constitutional rights in executing the search warrant in an illegal manner. This Court should find a Constitutional violation of the knock-and-announce rule and remand the case to the Texas Court of Criminal Appeals for further review.

iii. Policy Considerations.

Even though this case qualifies under it, it bears mention that the "causal connection" argument in *Hudson* and other cases does not hold water.[10] There are only three types of searches:

1. legal (where evidence is obtained through legal process),
2. ineffective (where no evidence is obtained), and
3. illegal (where evidence is obtained through illegal process).

There is no need to suppress evidence unless evidence is found, so we can eliminate search type 2 from the analysis. Search type 1 never results in suppression because everything was done correctly.

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[10] The somewhat similar "causation" rule under Texas state law suffers the same logical absurdity.

The exclusionary rule thus applies, if ever, only to search type 3. That rule is designed to discourage the police from conducting illegal searches by taking away the fruits of illegal searches, the theory being that if police cannot use ill-gotten evidence, they will be discouraged from using illegal means to acquire it, or, said a better way, they will be ***encouraged*** to use only ***legal*** means. At its heart, the exclusionary rule is not about evidence, it's about police procedures.

The majority in *Hudson* looked at the issues from the wrong angle. The exclusionary rule – the enforcement mechanism for the Fourth Amendment – is not "designed" to keep evidence out of court; that is but one ***consequence*** of its application; the design or ***purpose*** of the rule is to encourage police obedience to the commands of fundamental law. When one focuses on the consequence of the rule's application instead of the reason for its existence, one can become confused and say it should not be applied unless the evidence would be "excluded" anyway because it would never have been discovered in a legal search. But that is illogical; it fantasizes that a type 2 search would have occurred if the law had not been violated.

The only time the anemic "causation" rule is logically applicable to suppression, and where the defense could prove that but-for police illegality no evidence would have been discovered, would be in those situations where ***no search whatsoever*** would have occurred if legal steps were followed. And that would only occur when the search is illegal because it was performed without a warrant or

proper cause or outside the reasonable scope of the warrant (as in this case).[11] That is, if no search would have happened ***at all*** if police had followed the law, then the defense could prove this "causal link" between improper police procedure and discovery of the evidence.

But trying to prove that evidence would not have been discovered if the police had knocked on the door instead of kicking it in is a fool's errand. The entry is always prior to the search itself, which means entry has always been completed when the search takes place – regardless of the ***manner*** of entry. In addition to the logical impossibility of proving a negative (i.e., proving something would not have been found), one cannot "prove" the police would not have found something once they are in the premises ***because of*** the physical manner in which they entered it. The two things (method of entry and search results) have literally nothing to do with each other, and to tie one to the other is illogical.

Finally, while the majority in *Hudson* apparently cannot envision any reason why testosterone-soaked "special" police[12] might want to

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[11] See *Weeks*, *supra*, and *New York v. Harris*, 495 U.S. 14 (1990), two oft-cited federal cases where the lack of a warrant was the "illegality" in question.

[12] "This status as a unique team within the large organization perpetuates the belief that these [SWAT] units and their members are 'elite,' a sentiment supported by their administrators." Peter J. Kraska and Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 Just. Q. 606, 610 n3 (No. 4, Dec. 1997). This even though in smaller

dress up, play soldier, and violate the knock-and-announce rule, it found adequate enticement for attorneys to take on all the troubles of no-knock 42 U.S.C. § 1983 cases – archaic immunities, paucity of damages, difficulty in proving harm, interminable delays, difficulty representing citizens against the police, etc. – in the filthy lucre of § 1988 attorney's fee awards. Only a person totally unfamiliar with how § 1983 lawsuits actually happen would accept such an argument.

Take this case: Petitioner waited for his criminal trial for over 5 years, then a year (and counting) of appeals. While the criminal case was pending, the federal court in his civil-rights action refused to allow discovery to proceed under a misguided belief that *Heck v. Humphrey*, 512 U.S. 477 (1994), applied, and has continued that stay while this petition is pending. Given interlocutory appeal of any qualified-immunity ruling (which the police will surely assert), and given the backlog in federal courts for civil jury trials, it might be 9 or 10 years before Petitioner finally gets his day in civil court, that is, if the courts don't pour his case out on a legal technicality like qualified immunity or some other basis. And if he recovers money damages, Texas law provides that the government will indemnify the responsible officers – if they are not insured, which most of them are. Tex. Civ. Prac. & Rem. Code §§101.0215 and 102.002. Anyone who

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locations, fully 18% of the entire department is involved in SWAT activities. *Id.* at 619. Are we to believe that small-town police forces have such a high percentage of truly-qualified officers?

thinks potential §1983 liability is an adequate "incentive" for policemen to stop breaking in doors is delusional, and the belief that "better police professionalism" is any more effective is also unfounded as shown in the treatises cited below.

If anything about *Hudson* is "bizarre" this is it. Not only did the *Hudson* majority not cite a single §1983 case in which significant damages or attorney's fees were ever awarded in a no-knock case, one could argue that the majority had the two motivations exactly backwards: the police are ***highly*** motivated to violate Constitutional rights since they may do so with impunity and it's thought to be "safer," while the citizenry is not capable of effective protest.

And if more is needed, criminal home invasions are sometimes conducted by persons pretending to be police officers and dressed accordingly. They announce they are the "police," disarm and disable the occupants, and then rape, rob, and kill them at their leisure. See Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, pp. 20-21 (Cato Institute 2006), detailing nine such incidents. A Google search on 10/31/13 for "home invasion robbery dressed as police" yielded 12,200,000 hits, over 50 of which (we stopped counting at 50) involved this exact situation.

If a homeowner has the right to defend his family in the confines of his home, even by people ***claiming*** to be police officers, anyone barging into the home – police or not – is placed at risk that such a defense will be to "the utmost." *Launock v. Brown*,

2 B. & Ald. 592, 593-4, 106 Eng. Rep. 482, 483 (1819).[13] And how, exactly, is the homeowner to know that it is ***really*** the police and not a home invasion robbery, even when the invaders "identify" themselves, and appear dressed, as the police? Obviously, he can't, and if he guesses wrong and shoots a real police officer, he will spend the rest of his life in prison – if he is not gunned down on the spot. Not a very appealing set of options. The only way to avoid putting citizens in this position is to forcefully discourage the current practice of serving routine warrants via SWAT, and the only way to do that is to apply the exclusionary rule to violations of the no-knock rule. Sure, this may cause trial courts to have more suppression hearings, but the costs of not adopting this rule are far, far greater.

If the premise behind knock-and-announce is to protect ***everyone***: police and homeowners alike, then police claims that no-knock entries are "safer" than knocking and announcing are demonstrably specious. If the police genuinely believe there is a risk to knocking and announcing, then the ***only*** sane way to approach such a situation is to lay siege to the property and force the occupants to come out in the open. No? Then the question must be: Is our goal of avoiding the potential destruction of evidence

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[13] G. Todd Butler, *Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-And-Announce Rule After Hudson v. Michigan*, 27 Miss. Coll. L.Rev.435 (2007-08). This article puts to bed any notion that no-knock raids are even ***hypothetically*** safer for anyone.

superior to our goal of protecting the safety of the police and the public?

Justice Brennan's dissent in *Ker v. California*, 374 U.S. 23, 55-57 (1963) (Brennan, J., dissenting) gives not just practical, but also Constitutional reasons why very few exceptions to knock-and-announce should be permitted, including that breaking doors overthrows the presumption of innocence (the people inside are presumed innocent, right? Do we throw flash-bang grenades into the homes of innocent people or kill their dogs?), and that most "exigent circumstances" are ambiguous, at best, in addition to a disturbing trend we have witnessed in the last 25 years: mistakes by police sometimes mean they attack the wrong house. According to Balko, botched SWAT raids happen hundreds of times a year, with police often raiding the wrong house – which should cause ***every*** law-abiding citizen more than a little concern. See Balko, *Overkill*, text at footnotes 1, 12, 16, 17, 151, 165, and pages 43-63 where he lists 63 instances of "wrong house" raids gone awry; *Warrior Cop*, pp. 309-312. See also Radley Balko, *The Drug War Goes to the Dogs*, (April 5, 2006)(available at http://www.cato.org/publications/commentary/drug-war-goes-dogs and http://www.salon.com/2013/07/13/radley_balko_once_a_town_gets_a_swat_team_you_want_to_use_it/.)

To say that these botched raids are the actions of a "few bad apples" in policing is dangerously naive: overly-aggressive policing is an organic police-culture issue. Police deviancy and lack of professionalism are well-documented phenomena. See, e.g., Kappeler, Sluder & Alpert, "Forces of Deviancy: Understanding

the Dark Side of Policing," p. 82 (Waveland Press, 2d ed. 1998): "The suggestion that police deviancy is primarily due to a few 'rotten apples' is too simplistic and fails to consider the multitude of possible determinants of police deviancy." See also, Sanja Kutnjak Ivkoviæ, "Fallen Blue Knights: Controlling Police Corruption," (Oxford University Press, 2005); Michael W. Quinn, "Walking With the Devil: The Police Code of Silence, What Bad Cops Don't Want You to Know and Good Cops Won't Tell You," (Quinn & Assoc. 2005); Jerome H. Skolnick and James J. Fyfe, "Above the Law: Police and the Excessive Use of Force," (Free Press 1993); Norm Stamper, "Breaking Rank: A Top Cop's Exposé of the Dark Side of American Policing," (Nation Books New York, 2005). For the Court to hang its hat on the hook of "professionalism" is to hang it on thin air.

II. Texas courts have upheld a conviction based on a verdict resulting from a jury charge that did not require the jury to find both elements of a two-element offense beyond a reasonable doubt, which means the conviction was procured in violation of the due process and trial-by-jury clauses of the U.S. Constitution.

A. Texas law holds that possession is a two-element offense.

A jury charge must require the jury to find all the elements of the offense charged. *Francis v. Franklin*, 471 U.S. at 313(proof of *all* elements of a

crime beyond a reasonable doubt is required by the due process clause of the Constitution); *West v. State*, 572 S.W.2d 712 (Tex.Crim.App. 1978)(leaving an element out of a jury charge, such as the culpable mental state, is a "fundamental error" and always results in reversal of a conviction; such errors may not be waived).[14] See also 21A Am. Jur. 2d Criminal Law §1198 ("A criminal defendant is presumed innocent unless and until the government proves beyond a reasonable doubt ***each*** element of the offense charged, ***including the mental element*** or mens rea")(emphasis added).

In *Blackman v. State*, 350 S.W.3d 588, 594 (Tex.Crim.App. 2008), the Texas Court of Criminal Appeals held that possession consists of two distinct elements:

> To prove the unlawful-possession-of-a-controlled-substance element of the

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[14] These errors are sometimes called "fundamental" or "egregious" or "structural" or "plain" errors. Courts assessing harm from such errors must decide whether they: (1) affect the very basis of the case, (2) deprive the defense of a valuable right [such as having the jury charged using correct law?], or (3) vitally affect a defensive theory. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Warner v. State*, 245 S.W.3d 458, 462 (Tex.Crim.App. 2008). Petitioner concedes that his lawyers did not raise the charge error to the trial court before the charge was submitted to the jury. But this oversight by trial counsel is irrelevant as a matter of law when a fundamental error is involved, *West*, *supra*.

> charged offense in this case, the State was required to PROVE that:
> 1) appellant exercised control, management, or care over the three kilograms of cocaine; and 2) appellant knew that this was cocaine.

We further diagram this law as follows [brackets and emphasis added]:

> To prove the unlawful-possession-of-a-controlled-substance element of the charged offense in this case, the State was required to PROVE that:
> 1) appellant ***[1A]*** exercised control, management, or care over ***[1B]*** the three kilograms of cocaine; and 2) ***[2]*** appellant knew that this was cocaine.

Element [1A] comes from Texas Penal Code §6.01, element [1B] comes from Texas Health & Safety Code §481.115(a), and element [2] (i.e., scienter) comes from Texas Penal Code §6.03(b).

Per *Blackman*, if a person knows he has a baggie in his pocket, he cannot be convicted of possession of cocaine unless the state proves ***both*** that it contains cocaine ***and*** that he knows it is cocaine. The scienter for the offense does not come merely from knowing that he possesses ***something*** in his pocket nor from the fact that the substance happens to be cocaine, but rather from the defendant ***knowing*** that what is in his pocket is, in fact, cocaine. This is basic due process and settled law in

Texas.[15] *Patterson v. New York*, 432 U.S. 197 (1977). Compare: *Alleyne v. U.S.*, 133 S.Ct. 2151 (2013). If a jury must find all elements for sentencing enhancement under the Sixth Amendment, a jury must surely have to find all elements of the underlying offense itself ("there [is] no 'principled basis for treating' a fact increasing the maximum term of imprisonment differently than the facts constituting the base offense," citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

As this Court has recently stated: "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne,* 133 S.Ct. at 2158. Here, the Texas Supreme Court has answered that question: a defendant's knowledge that a substance is cocaine is an element the state must prove for conviction. And the jury charge did not require the State to do so here.

B. The jury charge does not contain the second element of the offense.

The jury was incorrectly charged in violation of the Petitioner's rights under the Fourteenth Amendment's guarantee to due process and the Sixth

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[15] Offenses that do not require scienter are called "strict liability offenses." Possession of drugs in Texas is not a strict liability offense per *Blackman*. To those who would argue proof of scienter makes it difficult to convict, our system is intentionally ***designed*** to make it difficult to convict!

Amendment's right to a trial by jury because the jury was only charged with requiring the State to prove element [1A] and [1B] of the offense. App. 15a-16a. The jury was charged as follows [brackets added]:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of August, 2006, in Collin County, Texas, the defendant, **JOHN GERARD QUINN**, did then and there **[1A]** intentionally and knowingly possess **[1B]** a controlled substance, namely: cocaine, in the amount of less than one (1) gram, by aggregate weight, including adulterants and dilutants, then you will find the defendant guilty as charged.

App. 16a.

This charge only required the jury to find that Petitioner [1A]"intentionally and knowingly" ***possessed*** the substance and [1B] that it be cocaine. It says nothing about element [2]: that Petitioner had to ***know*** the substance was cocaine. Consider: if the State were to stipulate that Petitioner did ***not*** know what the substance was, but if the State proved it was in his intentional and knowing possession and that it was cocaine, would this charge still allow the jury to find Petitioner guilty? Yes it would, and that proves the deficiency.[16]

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[16] App. 16a. "Intentionally" and "knowingly" are adverbs modifying the verb "possess"; they do not modify the noun

C. The jury's note allowed the court to correct the charge error.

That the charge was patently defective due to fundamental error is beyond dispute. But during deliberations, the jury sent a handwritten note out to the court asking if the crime required proof that the defendant knew the substance was "illegal" (i.e., contraband). The jury's note said (all underlining in original):

> In the 8th paragraph of cause 429-81971-09 it states:
> A person commits an offense only if he voluntarily engages in conduct, including an act, and omission, or possession. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.
> The Question: Does the possessor have to know the thing is illegal.
> .

App. 32a.[17] In response to this question, the trial court had the opportunity to clear up the jury's

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"cocaine" or speak to defendant's knowledge of the nature of the substance.

[17] See *Poindexter v. State*, 153 S.W.3d 403, 405 (Tex.Crim.App. 2005), which somewhat differently defines the second element as knowing that the substance was "contraband." The *Blackman* standard does not necessarily require the defendant know he is breaking the

dilemma by answering the question "yes" as the defense urged. 10RR236 Amazingly, the prosecutor asked the court to tell the jury ***incorrect*** law by answering the question "no." *Id.* Without consensus from counsel, and perhaps due to its own ignorance, the trial court gave the jury an incorrect response: "You have all the law and the evidence. Continue to deliberate." *Id.* This answer was incorrect because the jury did ***not*** have all the law – the charge does not require the State to prove element [2] of the offense, only element [1A] and [1B].

Consider this hypothetical: what if the trial court had followed the suggestion of the prosecutor and answered the question "no"? Everyone would have to agree that this would be misinforming the jury about the law. So, what was the harm in answering the question "yes"? If all that did was restate the correct law, or clear up a jury-perceived ambiguity in the charge (an important purpose of jury questions), it would be a good thing to do or, at worst, it would be neutral. By telling a confused jury that it had "all the law," this was the equivalent of answering the question "no" – exactly as the

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law (someone may not know, for example, that steroids are contraband), and *Poindexter* seems to say that the defendant must know he is breaking the law because that's what "contraband" means. The jury's question in this case appears more in line with *Poindexter*. This presents an interesting academic issue, but either way, the charge was still deficient and the trial court should have properly resolved the issue in response to the jury's question.

prosecutor wrongfully urged in violation of Texas Code of Criminal Procedure art. 2.01.

The only possible scenario under which the jury would have asked that particular question was:

(A) the jury did not believe Petitioner knew he possessed cocaine,
(B) they were going to acquit if scienter was a required element, and
(C) because the charge erroneously left out scienter as an element, and the judge, when asked, did not clarify scienter as being an element, the jury felt they had to convict even though they did not believe Petitioner knew what the substance was because they were told his knowledge was irrelevant under "the law."

This case demonstrates in spades why leaving out required elements from the charge is fundamental error per *Francis v. Franklin*, 471 U.S. 307 (1987), and *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App. 1995). See also *Sanchez v. State*, 182 S.W.3d 34 (Tex.App. – San Antonio 2005, no pet.)(defendant's conviction for sexual assault reversed because the jury charge did not require the jury to find that the defendant knew that his contact with the victim was unwelcome – the second element of ***that*** crime). To sustain a conviction, the second element of Petitioner's crime must have been decided by the judge, violating due process and the Sixth Amendment's guaranty of a jury verdict on each element of a criminal offense.

Because the jury charge in this case did not instruct the jury as to the second element of the offense charged – scienter – it contained fundamental, egregious, un-waive-able error and the conviction cannot stand. When the error came to the trial court's attention in the form of the jury question, the trial court's failure to correct that error was another fundamental/egregious error that taints the conviction, requiring reversal.

D. Even if this error is reviewed under the harmless-error rule, the error cannot be classified as harmless given the jury's note.

Even if the missing element in the jury charge is reviewed under the standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), the error cannot be deemed harmless under the circumstances of this case.

A harmless error is one which did not contribute to the guilty verdict, and without which the court is convinced the guilty verdict would still have been obtained. Said another way, a harmless error is one which does not derail a substantial Constitutional right.

But this inquiry is not formulaic, either.

> What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another. ... In the final analysis judgment in each case must be influenced by conviction resulting from

> examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations.

Kotteakos, 328 U.S. at 761-62. The individual circumstances of each case must be evaluated.

Here, the jury's note would never have been written if they had already decided Petitioner knew that what he had in his possession was cocaine. The error being considered deals directly with that knowledge – knowledge which Texas law says the state must prove in order to obtain a conviction. The jury not only did not find that Petitioner knew the substance was cocaine, their question proves that they believed he did ***not*** know. Because knowledge is a required element of the offense that must be proven, even if harmless error is the standard, Petitioner has satisfied it in this case.

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 765. Accord: *Chapman v. California*, 386 U.S. 18, 20-24 (1967)("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

No one can look at this record and conclude that the jury found that Petitioner knew what was in his safe. Petitioner has thus been convicted of a two-element offense based on proof of only one element, and the requisite scienter element was not only lacking in the charge but almost certainly lacking in the minds of the jurors as well.

CONCLUSION

As one SWAT team commander said about administrative oversight of SWAT activities: "We're left alone. The brass knows that we know what we're doing more than they do. One of the reasons we're so effective is we have the freedom to handle situations and problems as we see best." Kraska, *Mayberry*, 14 Just. Q. at 619, noting that this autonomy applies especially in the area of no-knock entries. The police do not always "police" themselves; that is where this Court comes in – or doesn't.

The highest court in Texas has let stand a decision of a lower court holding that police may execute a no-knock entry of a private residence to serve a search warrant based solely on their suspicion that the occupants of the house might be in possession of a firearm. That ruling – combined with evisceration of the exclusionary rule – is a green light

for every police department in the nation to use SWAT raids to serve every warrant, every time. If that ruling is allowed to stand, *Richards v. Wisconsin* is no longer the law of the land and the Fourth Amendment takes a perhaps-fatal hit.

Equally egregious, Texas's highest court has upheld a ruling that affirms a felony conviction inarguably based on the jury finding only one element of a two-element criminal offense. If this ruling is allowed to stand, then *Francis v. Franklin* is moot, as is a good part of the Sixth Amendment and the due process clause of the Fourteenth Amendment.

Certiorari should be granted to correct these errors.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

JOHN GERARD QUINN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

APPENDIX

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OFFICIAL NOTICE FROM
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AUSTIN, TEXAS 78711

Wednesday September 25, 2013
Re: Case No. PD-0785-13
COA:: 05-12-00049-CR, TC # 429-81971-09

On this day, the Appellant's petition for discretionary review had been refused.
JUDGE MEYERS WOULD GRANT

Abel Acosta, Clerk

JAMES A PIKL
2801 NETWORK BLVD
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FOR PUBLICATION

THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS
No. 05-12-00049-CR

JOHN GERARD QUINN,	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 05-12-
	)	00049-CR
THE STATE OF TEXAS,	)	
Defendant-Appellee	)	OPINION
	)	

Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-81971-09

Argued and Submitted
May 17, 2013—Dallas, Texas

BEFORE: MOSELEY, O'NEILL, and LEWIS, Justices

Justice LEWIS. Appellant John Gerard Quinn was charged with aggravated assault of a peace officer and possession of cocaine in an amount less than one gram. The jury found him not guilty of the assault, but guilty of the possession offense. The trial court assessed Quinns punishment at 180 days confinement, suspended, and he was placed on community supervision for two years and ordered to

pay a $500 fine. Quinn raises three appellate issues: he contends the trial court erred in making its response to a jury question and in denying Quinns motion to suppress; he also contends the evidence is insufficient to establish he knew the substance in his safe was contraband. We affirm the trial courts judgment.

Background

A SWAT team served a search warrant on Quinn's home after he had gone to bed. The warrant was issued after two informants told police that Quinn's son, Brian, was manufacturing and selling drugs at the Quinn residence and that Brian kept a number of weapons in the house, including an AK–47 rifle. Quinn awoke during the entrance of the SWAT team and grabbed his handgun. One officer on the SWAT team testified he saw Quinn point the gun at him, and the officer shot Quinn in the hand. The police found a number of guns and a bag containing less than a gram of cocaine in two safes in Quinn's bedroom. Quinn was charged with aggravated assault of a peace officer and possession of cocaine; the jury found him not guilty of the assault but guilty of the possession. The trial court assessed his punishment at two years of probation and a $500 fine.

The Motion to Suppress

Quinn filed a motion to suppress the evidence acquired pursuant to the search warrant; the trial court denied the motion. In this Court, Quinn challenges the sufficiency of the affidavit that supported the warrant and the police's no-knock entry into his home to execute the warrant. We review the trial court's ruling on a motion to suppress by viewing all of the evidence in the light most

favorable to the court's ruling. *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex.Crim.App.2012). We afford the trial court's determination of historical facts almost total deference, and we afford the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. Id. Likewise, we give almost total deference to the trial court's ruling on any mixed questions of law and fact that depend on an evaluation of credibility and demeanor. Id. We review legal questions—and any mixed questions of law and fact that do not involve issues of credibility or demeanor—de novo. Id.

Sufficiency of the Affidavit

Quinn contends that the affidavit offered in support of the search warrant in this case contained unreliable and false information and could not justify a finding of probable cause. Before a magistrate can issue a search warrant, he must first find probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex.Crim.App. 2012). We review the four corners of the supporting affidavit to determine whether it provides a substantial basis for issuing the warrant. Id. Probable cause exists if, given the totality of the circumstances, there is a fair probability that contraband will be found at the location identified. Id. "This is a flexible, nondemanding standard." Id. We will uphold the magistrate's decision so long as he had a substantial basis for concluding that probable cause existed. Id.

Quinn challenges the reliability of the two informants who brought the information to the

police. He stresses that neither had provided information to the police before. But both informants were identified by name in the warrant affidavit, a fact that lends credibility to their statements. See *Matamoros v. State*, 901 S.W.2d 470, 478 (Tex.Crim.App.1995) when probable cause affidavit specifies named informant as supplying information upon which probable cause is based, affidavit is sufficient if it is sufficiently detailed to suggest direct knowledge on informant's part). Both informants admitted activity related to Brian's drug dealing but—at least at the time they assisted police—neither was offered leniency in return. Both informants appeared to be motivated in part by Brian's telling them that people had died after taking his drugs. And both informants independently gave significant details about where contraband could be found: they identified Brian's house, specific rooms in the house, and hiding places in those rooms. In effect, the informants corroborated each other. Both identified the same list of drugs Brian was involved with; both told police about a storage unit where Brian kept supplies; and both described pill presses of different sizes that Brian owned and used in his drug trade. Finally, one of the informants cooperated with police in sending a text to Brian from the informant's phone, asking to buy Xanax. He received a texted reply from Brian's number, agreeing to provide the drugs when Brian got home. We conclude the informants' information was sufficiently reliable for the magistrate to rely upon in determining probable cause.

Quinn also challenges the veracity of the affiant-officer, Detective Christopher Grollnek, particularly

concerning whether benefits were offered to the informants that would make their information less reliable. Grollnek stated in his affidavit that both informants made statements against their penal interest with no promise of leniency. Quinn elicited testimony, however, that neither informant was ever convicted: one informant's case was ultimately dropped, and the second informant never had charges filed against him. Quinn charges that Grollnek's statement was false when made. But Grollnek testified at trial that, at the time his affidavit was made, his statement was true; only afterwards did circumstances change for both informants. We give almost total deference to the trial court's determination on issues involving credibility and demeanor. See *Gonzales*, 369 S.W.3d at 854. We cannot conclude the affidavit contained a deliberate falsehood that would support voiding the search warrant.

We conclude the magistrate had adequate reliable information in Grollnek's affidavit to conclude, within a fair probability, that drugs and guns would be found in Quinn's residence. Thus, the police obtained a valid search warrant based on probable cause.

The No–Knock Entry

Quinn also contends evidence should have been suppressed because the police entered his residence unannounced. The Fourth Amendment does not require the police to knock and announce in all cases. *Richards v. Wisconsin*, 520 U.S. 385, 395, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). It is not necessary when circumstances present a threat of physical

violence or when there is reason to believe that evidence would likely be destroyed if advance notice were given. *Hudson v. Michigan*, 547 U.S. 586, 589, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). When reviewing a no-knock issue, we ask whether police had a reasonable suspicion under the particular circumstances that one of these grounds for failing to knock and announce exists. Id. at 590. The United States Supreme Court acknowledges that this reasonable-suspicion showing is not high. Id. Nevertheless, the police are required to make that showing whenever a defendant challenges the reasonableness of a no-knock entry. *Richards*, 520 U.S. at 394.

We conclude the State has made a satisfactory showing that the circumstances presented a threat of physical violence in this case, based upon the informants' statements that Brian kept a number of guns in his home, including an AK–47. Unannounced entries have been upheld as reasonable when the police had information there were guns on the premises to be searched. See, e.g., *Stokes v. State*, 978 S.W.2d 674,677 (Tex.App.Eastland 1998, pet. ref'd) (testimony that police had been informed marijuana and guns were present in house to be searched made no-knock entry reasonable under circumstances); *Klepper v. State*, No. 05-02-01283-CR, 2003 WL 22662508 (Tex.App.Dallas Nov.12, 2003, pet. ref'd) given confidential informant's report that house to be searched contained weapons, together with surveillance equipment observed by police, police could have reasonably suspected threat to officers' safety). Officers involved in the planning, preparation, and execution of the operation testified

they believed the operation was high-risk because of the presence of guns on the premises. One officer testified the presence of an AK–47 particularly concerned the team, because the officers' body armor would not protect them from its shots. We conclude the officers' knowledge that guns, including the exceptionally dangerous AK–47, were likely to be on the premises to be searched made the no-knock entry reasonable under the existing circumstances.

However, even if we were persuaded the unannounced entry was not reasonable, we would conclude the evidence seized from Quinn's house should not have been suppressed. Texas law provides that:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

TEX.CODE CRIM. PROC. ANN. Art. 38.23(a) (West 2005). But Texas courts have established that evidence is not obtained in violation of a provision of law when there is no causal connection between the illegal conduct and the acquisition of the evidence. *Gonzales v. State*, 67 S.W.3d 910, 912 (Tex.Crim.App.2002); see also *Pham v. State*, 175 S.W.3d 767, 772-73 (Tex.Crim.App.2005) (casual connection between violation and obtaining evidence must be shown before evidence is rendered inadmissible). The burden is on the moving party to

produce evidence demonstrating that causal connection. *Pham*, 175 S.W.3d at 774.

In this case the police were permitted to search the residence pursuant to a valid warrant. Regardless of how they entered the house, they would have legally found the cocaine in Quinn's safe. Accordingly, there was no causal connection between the no-knock entry and the discovery of the cocaine; the evidence would not be suppressed.[1]

We overrule Quinn's second issue.

Sufficiency of Evidence

In his third issue, Quinn contends there is insufficient evidence to support his conviction. Quinn's specific argument is that the evidence is insufficient to establish that he knew the substance in his safe was contraband. To prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control,

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[1] Quinn equates this requirement of causal connection with the doctrine of inevitable discovery, and he correctly points out that the federal inevitable discovery doctrine does not apply to the Texas exclusionary rule. See *State v. Daughtery*, 931 S.W.2d 268, 273 (Tex.Crim.App.1996) ("Article 38.23 does not contemplate an inevitable discovery exception."). But the causal connection required by Gonzales and Pham is not the same as inevitable discovery. See *State v. Callaghan*, 222 S.W.3d 610, 615 and n. 6 (Tex.App.Houston [14th Dist.] 2007, pet. ref'd) ("[C]ourts and legal commentators have agreed the majority opinion in Hudson is about causation and not about the inevitable discovery doctrine.").

management, or care over the substance; and (2) the accused knew the matter possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex.Crim.App.2005). We determine whether the evidence is sufficient to support a conviction by asking whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Johnson v. State*, 364 S.W.3d 292, 293-94 (Tex.Crim.App.2012).

In the absence of an admission by the accused, knowledge must be proven circumstantially. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex.Crim.App.1985). "One's acts are generally reliable circumstantial evidence of one's intent." *Laster v. State*, 275 S.W.3d 512, 524 (Tex.Crim.App.2009). The record indicates Quinn locked the cocaine in a safe in his bedroom along with a loaded gun, a vial of testosterone, and his passport. Accordingly, the jury could infer Quinn believed that the substance had some value to him and that he wanted it kept safe from theft or loss or misuse. Brian testified he did not have the combination to his father's safe. Thus, the jury could also infer that Quinn intended to keep the substance private.

Brian testified his father did not use drugs, and the cocaine probably belonged to him or to friends of his who had brought drugs to the house. However, jurors are the sole judges of the credibility of the witnesses, and they may choose to believe or disbelieve any witness. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App.2008). Brian also testified that his father had thrown him of the house for drug

use once before. He related that his father would confront him with drugs when he discovered them so that Brian would be forced to acknowledge he was using them. Thus, he suggested, Quinn may have been holding drugs he found to confront Brian. But this contention proves too much: Quinn would only confront Brian if he knew the bag contained illegal drugs.[2]

In the end the bag containing cocaine was in Quinn's safe, and only he knew the combination. The State was not required to prove the reason he held or hid the cocaine. He clearly possessed it, and given that he must have put it in the locked location, the jury could infer he knew what was in the bag. A rational juror could certainly have concluded Quinn knew what was in the bag was contraband. Accordingly, the evidence of knowledge is sufficient, and we overrule Quinn's third issue.[3]

Response to Jury Question

In his first issue, Quinn complained that the trial court's answer to a question from the jury was an improper comment on the weight of the evidence and

---

[2] Quinn asks us to create a "parental exception" to Texas law on possession. Such a creation is the job of the Legislature, not this Court.

[3] At oral argument counsel for Quinn contended that, although the jury charge tracked the statute for possession of contraband, the trial court should have specifically instructed the jury that the defendant must know the substance he possesses is illegal. Quinn failed to raise or brief this issue on appeal, and it is not before us.

the defense's theory of the case. However, Quinn has acknowledged a mistake in his understanding of the record on this issue. The jury sent this question to the judge:

> In the 8th paragraph of cause 429–81971–09 it states:
>
> > A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

The Question: Does the possessor have to know the thing is illegal.

> And, without objection from either party, the judge sent this answer:
>
> You have all the law and the evidence in this case. Please continue your deliberations.

However, Quinn thought the judge had sent this answer to the above-quoted question instead:

> In response to the jury note, you have all the law and the evidence in this case. A rereading of the closing arguments is not permitted. Please continue your deliberations.

In reality, this second answer was sent in response to the intervening jury question:

Can we get the closing arguments?

Because Quinn has acknowledged his confusion, we need not address the first issue.[4]

Conclusion

We have decided each of Quinn's issues against him. Accordingly, we affirm the trial court's judgment.

/David Lewis/
DAVID LEWIS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

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[4] In his reply brief, Quinn acknowledges his initial mistake, but then says the court's refusal to allow a rereading of closing arguments constituted error. Quinn may not use his reply brief to raise new issues. See *Dallas County v. Gonzales*, 183 S.W.3d 94, 104 (Tex.App.Dallas 2006, pet. denied). Indeed, Quinn's original brief conceded that "counsels' closing statements are not reread after deliberations begin."

In The 416th Judicial District Court,
Collin County, Texas
Honorable Chris Oldner, Presiding

Cause No. 429-81971-09

STATE OF TEXAS

VS.

JOHN GERARD QUINN

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, **JOHN GERARD QUINN**, stands charged by indictment with the offense of possession of a controlled substance, alleged to have been committed on or about the 6th day of August, 2006 in Collin County, Texas. The defendant has pleaded not guilty.

Our law provides that a person commits an offense if he intentionally or knowingly possesses a controlled substance.

Cocaine is a controlled substance.

Possession means actual care, custody, control or management of property.

"Adulterant and lilutant: means any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

You are instructed that which the indictment alleges that the offense was committed on or about the 6ht day of August, 2006, you are not bound to find that the offense, if any, took place on that specific date. It is sufficient if the alleged date is approximately accurate, and you find that the offense, if any, occurred prior to the 10th day of September, 2010, the date of the return of the

indictment in this case, and is not barred by the statute of limitations.

You are further instructed that the statute of limitations for the offenses of possession of a controlled substance is three (3) years from the date that the alleged offense occurred.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of August, 2006, in Collin County, Texas, the defendant, **JOHN GERARD QUINN**, did then and there intentionally or knowingly possess a controlled substance, namely: cocaine, in the amount of less than one (1) gram, by aggregate weight, including adulterants and dilutants, then you will find the defendant guilty as charged.

You are instructed that a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. Each party to an offense may be charged with commission of the offense.

A person is a party to an offense and criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

Mere presence or even knowledge of an offense does not make one a party to an offense. Acts

committed after the offense is complete cannot make one a party to an offense.

Therefore, if you find and believe from the evidence beyond a reasonable doubt that **JOHN GERARD QUINN,** acting with the intent to promote or assist the commission of the offense of possession a controlled substance, namely: cocaine, solicited, encouraged, directed, aided, or attempted to aid Brian Quinn in the commission of the offense, then you will find him guilty as charged.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and, in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or charged with an offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence

alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case.

The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if they fail to do so, you must acquit the defendant.

You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. The Court has no right by any word or any act to indicate any opinion respecting any matter of fact involved in this case, nor to indicate any desire respecting its outcome. The Court has not intended to express any opinion upon any matter of facts in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

You are instructed that any statement of counsel made during the course of the trial or during argument not supported by the evidence, or statement of law made by counsel not in harmony with the law as stated to you by the Court in these instructions, are to be wholly disregarded.

You are further instructed that you should not question the Bailiff concerning the testimony or the law of the case, nor should you discuss the case in his presence. If you have any questions, you should

reduce them to writing, to be signed by the presiding juror, and present them to the Court.

If the Jurors disagree as to the statement of any witness, they may, upon applying to the Court, have read to them from the Court Reporter's notes that portion of such witness' testimony, and only that portion, on the point in dispute.

You are instructed that the indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence, nor can it be considered as such when passing upon whether the defendant is guilty or not guilty.

During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you retire to the jury room, you should select one of your members as your presiding juror. It is their duty to preside at your deliberations and vote with you. Your verdict must be unanimous and signed by the presiding juror.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and the weight to be given their testimony, but you must be governed by the law you receive in these written instructions.

Suitable forms for your verdict are attached hereto. Your verdict must be in writing and signed by your presiding juror. Your sole duty at this time is to determine whether the defendant is guilty or not guilty under the indictment in this cause and you are to restrict your deliberations to that issue.

Signed this 26th day of October, 2011.

/s
CHRIS OLDNER
Judge Presiding

W219-08032006-3

Affidavit For Search Warrant

THE STATE OF TEXAS
COUNTY OF COLLIN

The undersigned affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:

1. There is in McKinney, Collin County, Texas, a suspected place and premises and curtilage described as follows: 2406 Bastille Court, McKinney, Texas, which appears to be a two-story red brick single-family dwelling with white trim, gray composition shingle roof, light green front door facing west, a cast stone with the numbers "2406" inserted into the front of the mailbox facing west as well located in front of the residence by the street, and all vehicles and persons located at said place and premises.

2. There is at said suspected place and premises personal property concealed and kept in violation of the laws of Texas and described as follow: Powder Cocaine, Marijuana, Xanax, and other suspected illicit narcotics as well as firearms.

3. Said suspected place and premises are in charge of and controlled by each of the following persons: Quinn, John Gerard, w/m/03-10-54 with Texas Drivers License

#14661344, Quinn, Brian Patrick w/m 07-10-1984 with Texas I/D #13508099.

4. It is the belief of Your Affiant, and he herby charges, and accuses that within the last one hundred twenty hours (124) Brian Quinn has been in possession of approximately five thousand (5000) homemade pills of Xanax, over five hundred (500) doses of Anabolic steroids, an unknown amount of Powder Cocaine and Marijuana, and a hand held pill press.

5. Your affiant is Christopher Grollnek, a licensed Peace Officer in the State of Texas, who is employed by the McKinney Police Department and is currently assigned to the McKinney Police Department of Criminal Investigations Division, Narcotics Enforcement Unit. He has been employed as a Peace Officer since 2003 and with the McKinney Police Department since October 2003. Your Affiant has been assigned to the Criminal Investigations Division Narcotics Enforcement Unit since December 2005, and prior to that from 2003 until 2005 and has been involved in numerous investigations, which have included Narcotics arrests with convictions in the past.

   Affiant has probable cause for said belief by reasons of the following facts:
   During the past year, Brian Quinn has been manufacturing Xanax with a hand held pill press, as well as distributing power Cocaine,

Anabolic steroids, Marijuana, and Valium. Your affiant believes this to be true for the following reasons.

While executing search warrant #W219-07312006-1, Niels Alexander Hansen was arrested for possession of marijuana. Detective Arp and Your Affiant of the McKinney Police Department Narcotics Unit began to de-brief Niels. During this de-brief Niels advised Your Affiant and detectives of the McKinney Police Department that he purchased his Marijuana from Brian Quinn. He went on to advise that Brian Quinn manufactured his own Xanax and had fronted Xanax to Niels previously for him to sell. He advised that he had seen Cocaine, Marijuana, Anabolic steroids, and Xanax in Brian Quinn's house as recent as four days ago. Niels had seen the smaller of Brian's two pill presses in his house on this same visit. Niels advised that Quinn had stated that the larger of his two pill presses was currently being stored in a storage unit. These statements were made against Niels own Penal interest and were not in exchange for any promises of leniency. Detective Arp and Your Affiant then drove Niels to 2406 Bastille Court, McKinney, Collin County, Texas per Niels' directions, who identified the same as Brian Quinn's residence.

Niels made statements against his penal interest in the form of a written statement with McKinney Police service number 06-39299. In his written voluntary statement

dated 08-02-06, Niels Hansen wrote that he knows Brian Quinn manufactures Xanax and that he (Hansen) used to get weed from him. Hansen stated that he was at Quinn's house about a week ago and saw at least 5,000 empty capsules, a weight stacker box full of Xanax powder, and a mini pill press. Hansen states he has also seen homemade Cocaine and Anabolic steroids at Quinn's house in his room. That was located in Quinn's closet, under his bed, and under the couch. Quinn fronted Hansen one thousand Xanax pills which got stolen the next day. Hansen told Quinn that he did not want to mess with anything that has killed people. Hansen states that he at Quinn's house approximately four days ago and saw these materials.

Niels provided this statement at the Collin County Jail's Book-in area, while knowing full well that he would still be incarcerated for his crime.

On 8-3-06 at approximately 1700 hours, the McKinney Narcotics Unit received a phone call from a person who identified himself as Michael Wilkerson. Wilkerson stated that he knew Quinn was manufacturing Xanax at Quinn's residence. Wilkerson stated that it was urgent that we stop Brian Quinn's distribution and went on to say that he knew that one person in Allen Texas had died of Xanax overdoses and wanted it stopped. This information concerning the Xanax related deaths was confirmed with Allen Police

> Narcotics Division. After a lengthy conversation, Michael Wilkerson stated he would come in and write a voluntary statement as a concerned citizen. Wilkerson currently lives in McKinney and is a graduate from McKinney High School. Wilkerson appears to have no motive for making these statements other than his concern for his community and fellow citizens. Wilkerson stated that he has personally known Brian Quinn since elementary school and now wants nothing to do with his narcotics distribution or its consequences. Detective Arp and Your Affiant picked up Wilkerson who drove Detective Arp and Your Affiant to 2406 Bastille Court, McKinney, Collin County, Texas and identified same as Brian Quinn's residence.

In Wilkerson's written voluntary statement dated 08-03-06, Michael Wilkerson writes that he is a resident of McKinney and knows it to be true that Brian Quinn has been involved for the past six years in the distribution of Marijuana, Prescription Pills including Narcotics, Cocaine, and Anabolic steroids. Wilkerson states that in the last calendar year Brian has been manufacturing Xanax and Valium into pills and capsules, the capsules being clear, blue, and grey in color. Wilkerson states that the press(s) are in a storage unit located in Allen, TX west on McDermott, along with powder Xanax, Valium, and chemicals needed to produce anabolic steroids. Wilkerson m

> stated in his verbal conversation to Your Affiant that Brian Quinn has a 600 pound press, which he had helped move for Quinn

into a storage unit and that he had observed a hand held pill press in Quinn's closet that was smaller in size within the last week.

In his written statement, Wilkerson writes that capsules [used to make the pills] are in Quinn's room. Wilkerson states that he knows this to be true within the last calendar week. Wilkerson writes: "***There is also a room ajoined to his [Quinn's] by a bathroom. His room will be the door to the left of the stairs the door on the left the ajoined room will be across the hall in there a safe holding cash, anabolic steroids, and a revolver he also has many alias he has rented P O Boxes with. He also is in posesion of a AK-47 the anabolic steroids are in viles also in pill form pink in color pentagon in shape. He has a capsule press and a industrial press there are also pills in Brian Frusco's residence. I identified these locations to the officers. I have with my own eyes have observed pills, capsules, anabolic steroids, firearms, and large amounts of cash this being within the last seven days.***"

During the conversations with Hansen and Wilkerson Your Affiant was advised that Brian Quinn's distribution of illegal Xanax had caused the death of at least two individuals. Both Hansen and Wilkerson report to have been told this by Brian Quinn himself. These conversations are the stated reasons for Wilkerson's and Hansen's voluntary removal

from Brian's Quinn's operation. Furthermore, these conversations appear to play a part in both Wilkerson and Hansen's motivation to assist law enforcement's attempt to shut down Brian Quinn's narcotics distribution.

Within the last three (3) hours, while in Your Affiants presence, Wilkerson text messaged Quinn at phone #469-952-0802 which is stored in Wilkerson's phone under Quinn, and asked Quinn if Quinn had any "bars" referring to Xanax. Within five (5) minutes Quinn replied to Wilkerson's text message, "yeah, I'll hit you up when I get home." At the time of typing this Search Warrant, Quinn has not responded to Wilkerson stating Quinn was home. There are two McKinney Police Department Detectives conducting surveillance at Quinn's residence awaiting his arrival.

Your Affiant is not requesting permission to search the storage unit in Allen, Texas containing the pill presses used to manufacture illegal narcotics for resale. This is due to being unable to positively locate the storage unit at this time. Your Affiant hopes, either through cooperation of Quinn or through rental documents found during the execution of this warrant that this location will be discovered and contra-band removed.

Based on your Affiant's training, experience, and participation in investigations involving controlled substances, your Affiant knows:

A) That drug traffickers very often place assets in names other than their own, including the names of co-conspirators, to avoid detection and seizure of these assets by law enforcement agencies.

B) That even though these assets are in other persons' names, the drug trafficker who actually owns the asset continues to maintain control over the asset.

C) That large-scale drug traffickers must maintain on hand large amounts of U.S. Currency in order to maintain and finance their on-going illegal activity.

D) That drug traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders and other negotiable instruments, hotel receipts, and other papers relating to the transportation, ordering, sale, and distribution of controlled substances, and that these books, records, receipts, etc., are maintained where the drug traffickers have ready access to them.

E) That it is common for large-scale drug traffickers to secret contraband, proceeds of drug sales, and records of drug transactions in secure locations within their residence and / or business for their ready access and to conceal those items from law enforcement.

F) That persons involved in large scale drug trafficking conceal in their residences and businesses caches of drugs, large amounts of currency,

financial instruments, precious metals, jewelry, and other items of value and / or proceeds of drug transactions and evidence of financial transactions relating to the obtaining, transferring, secreting, and / or spending of large sums of money made from engaging in illegal drug trafficking activities.

G) That when drug traffickers amass large proceeds from the sale of drugs, they attempt to legitimize these profits. That to accomplish these goals, drug traffickers often utilize domestic banks and their attendant services, securities, cashier checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations, and business fronts.

H) That drug traffickers commonly maintain addresses and / or telephone numbers of their associated in the trafficking organization. That these records are often kept in computers for ready access.

I) That drug traffickers take or cause to be taken photographs and video of themselves, their associates, their property, and their product. That the drug trafficker usually maintains photographs.

J) It is my training and experience that unexplained wealth is evidence of crimes motivated by freed, in particular, drug trafficking.

K) That based on my experience and training, drug traffickers commonly

have in their possession, that is on their person, at their residence(s), business(es), and in their vehicles, firearms, including but not limited to handguns, rifles, shotguns, and other weapons. These firearms are used to secure and protect their product, books, U.S. Currency, etc.

L) That based on my experience and training, drug traffickers, have an ongoing, illegal drug trafficking scheme that can be dormant for periods at a time; however, during this dormant period, drug traffickers continue to maintain records of drug transactions and sales; further that this dormant period is often used by drug traffickers to further their illegal scheme on other areas such as wholesale, retail, and money laundering.

M) That based on my experience and training, drug traffickers often utilize computers, the attendant software, printers, computer scanners, fax machines and modems for accessing the Internet to browse through technical information and relay communication to associates in regard to deliveries, pick-ups, transfers, intelligence, etc., in furtherance of their drug trafficking schemes.

Your Affiant is also aware that suspects involved in the sales / manufacture of narcotics sometimes possess firearms and / or various weapons for the

purpose of protecting their illegal narcotic distribution business.

THEREFORE, Affiant asks for issuance of a warrant that will authorize him to search said suspected place and premises for said personal property and seize the same, and to arrest each said described and accused person.

_____

AFFIANT

SWORN TO AND SUBSCRIBED before me by said Affiant on this the 3 day of Aug, 2006.

_____

Magistrate, Collin County, Texas

Note #3
Recd 1:10 pm
OCT 26 2011

QUESTION 2

IN THE 8TH paragraph of Cause 429-81971-09
IT STATES:

A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

THE QUESTION: DOES THE possessor have to know THE thing is illegal.

ERNEST Becker

SCANNED

IN THE
TEXAS COURT OF CRIMINAL APPEALS

JOHN GERARD QUINN,
Petitioner,

vs. No._____

THE STATE OF TEXAS,
Respondent.

PETITION FOR DISCRETIONARY REVIEW

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PARTICIPATING ATTORNEYS
WITH THE RUTHERFORD
INSTITUTE, ATTORNEYS FOR
PETITIONER

PETITIONER REQUESTS ORAL ARGUMENT

* * * * * * * *

GROUNDS FOR REVIEW

1. Suspicion by police that a residence may contain a firearm is Constitutionally-insufficient justification to allow police to conduct a "no-knock" entry when serving a search warrant. Because the only purported justification for the no- knock entry in this case was the suspected presence of firearms in the residence, Petitioner's Constitutional rights were violated by the no-knock entry. Due to that violation, Texas Code of Criminal Procedure art. 38.23 requires that all evidence seized in the search be suppressed. Because the lower courts refused to suppress the evidence, the conviction must be overturned.

2. The jury charge did not contain the requirement of guilt beyond a reasonable doubt on ***both*** elements of the offense of possession of drugs. The jury subsequently asked a question that would have allowed the trial judge to fix the mistake in the original charge so that the jury would have been informed of the correct law. However, the trial court answered the jury's question incorrectly. Those errors undoubtedly lead to the conviction.

3. Insufficient evidence exists to support the finding of the jury – if such a finding even occurred, which is unlikely – that Mr. Quinn knew the substance in his safe was contraband, so the conviction cannot stand.

ARGUMENT

1. The illegal SWAT raid requires suppression of evidence.

A. The law requires a no-knock warrant or exigent circumstances before a no-knock entry of a residence will pass Constitutional muster.

The Supreme Court of the United States (SCOTUS) holds that a search may only be conducted via no-knock entry under two circumstances:

(1) using a no-knock warrant, or

(2) when exigent circumstances lead police to conclude that knocking and announcing risks:

(a) the safety of persons, or

(b) destruction of evidence.

Richards v. Wisconsin, 520 U.S. 385 (1997). Texas follows this rule. *Jeffrey v. State*, 169 S.W.3d 439, 443-44 (Tex.App. – Texarkana 2005, no pet.).

Here, the police based their no-knock entry solely upon their suspicion that the occupants of the residence may have been in possession of a rifle. The Court of Appeals cited two intermediate appellate

opinions in which courts have found the suspected existence of firearms justified no-knock entries. However, this Court and SCOTUS have ***never*** held that suspected possession of firearms is sufficient cause, without more, to justify a no-knock entry. This Court should now decide it does not. TRAP 66.3(b)

That the suspected possession of weapons was the sole "justification" for use of a no-knock entry in this case is undisputed. See 5 RR 290-92 (Appendix 18-20) and 4 RR 205 (Appendix 17).[1] The issue of whether the mere suspicion of weapons is sufficient to justify no-knock entries is thus squarely presented to the Court in this case.[2]

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[1] The warrant affidavit, State's Exhibit 255 (Appendix 23-29), states generalized knowledge regarding drug cases, including item (K): "drug traffickers commonly have in their possession, that is[,] on their person, at their residence(s), business(es), and in their vehicles, firearms, including but not limited to handguns, rifles, shotguns, and other weapons." If true, then possession of firearms is a *generalized* circumstance in all drug cases, which in turn means that every drug case is one in which the police would reasonably suspect that weapons are in the residence. Thus, suspicion of weapons at the site of a drug search is nothing more than the blanket exception to the no-knock rules that SCOTUS unanimously struck down in *Richards*.

[2] The Court of Appeals seems to think that an "AK-47" rifle is some sort of "exceptionally" dangerous weapon. Actually, despite the faux mystique surrounding that particular type of rifle fostered by popular media, the AK-47 is not uniquely dangerous. It is the most-used rifle in the world because there are 100 million of them, it is cheap to make and easy to repair, and because it can be

B. The presence of lawfully-owned weapons in a residence cannot justify a no-knock entry under the Constitution.

This case involves the confluence of two Constitutional rights: the Constitutional right of persons to keep working firearms in their residences

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chambered for a wide variety of calibers. However, when chambered for .223 caliber (NATO 5.56x45 mm, the most common chambering by far), it is no more dangerous than any other .223 caliber rifle such as the AR-15 – the most widely used hunting rifle in the U.S. today. Dangerous, yes, but not "exceptionally" so. As we pointed out to the Court of Appeals (Reply Brief, p. 9), and as was pointed out by the police in the trial (7 RR 29-30; Assistant Chief Redden testifying), it is the size and type of ***ammunition*** (armor-piercing, etc.) that makes a weapon dangerous, not the style or type of rifle in question.

As a gun collector who prudently kept his legally-owned collection safely secured in gun vaults, it was altogether possible that Mr. Quinn could have had a large number of guns in his home and ***no*** ammunition. The point here is not to argue that "possession" of guns does not roughly or usually equate to possession of "working" guns. The point is: an AK-47 is no more powerful – and is indeed ***less*** powerful – than many common hunting rifles that can be chambered up to .460 Weatherby Magnum – a weapon many times more powerful than a .223 rifle. Even a .357 magnum handgun, one of the most popular calibers, is more powerful than a.223 rifle. The police, being weapons experts, obviously knew this – but testified about the "dangerous" nature of this particular gun because they knew the jury would have heard of it in the media and would know about its mystique as the weapon of choice for terrorists around the world. Clever, but misleading.

for self- defense (*District of Columbia v. Heller*, 128 S.Ct. 2783 (2008)), and the right to be secure from unreasonable searches and seizures under the Fourth Amendment. SCOTUS has held this second right includes freedom from no-knock entries except in specific circumstances. *Richards v. Wisconsin*, *supra*.

Since under Texas statutory law, if the Fourth Amendment is violated, suppression of any evidence obtained is automatically suppressed, the only question is:

> Did the police in this case violate Mr. Quinn's Constitutional rights by using a no-knock entry based solely on their suspicion that weapons were being kept in the house?

And subsumed within that question is the key question in this issue:

> Can a no-knock entry be justified solely based on police suspicion that the occupants might have weapons?

No cases out of SCOTUS or this Court have held that mere possession of firearms in a residence is sufficient justification for a no-knock entry to serve a warrant. But this exact situation has been brewing for a while, and was predicted in a recent law review article by John D. Castiglione: *Another Heller Conundrum: Is it a Fourth Amendment "Exigent Circumstance" to Keep a Legal Firearm in Your Home?* 59 U.C.L.A. Rev. Discourse 230, 239 (2012)(Appendix 42-55):

> It is only a matter of time before a plaintiff seeking to challenge a forced entry through a civil suit (or in the rare case, a defendant seeking suppression of evidence) will argue that the presence of a lawfully possessed firearm in the home could not permissibly be a factor in overcoming the knock-and-announce requirement. At the time of this writing, there appear to be no reported cases in which this argument has been made. It will happen. At that point, the federal courts (and potentially the Supreme Court) will need to adopt a framework for deciding whether the presence of a suspected firearm can justify a no-knock entry.

Mr. Castiglione's prophesy has come true.[3]

C. Suppression of required under Texas law.

Under ***federal*** law, suppression of evidence is not always necessary just because police violate the knock-and-announce rules. *Hudson v. Michigan*, 547 U.S. 586 (2006, Kennedy, J., concurring in the judgment).[4] However, there is no "federal

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[3] See also, Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2012 Update)(Appendix 56-64).

[4] The dissent in *Hudson* makes a convincing case that the plurality opinion pretty much guts the only thing

exclusionary" statute. Under federal law, the exclusionary rule is exclusively common law and can be changed by the courts. *Weeks v. U.S.*, 232 U.S. 383 (1914). Not so in Texas.

In Texas, the exclusionary rule is statutory and requires suppression of evidence where the legal or Constitutional rights of the suspect are violated. CCP art. 38.23 states in relevant part:

> Art. 38.23. EVIDENCE NOT TO BE USED. (a) No evidenceobtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

The only thing we can take from federal law is one avenue among many for determining whether CCP art. 38.23 is triggered (violation of the U.S. 4th Amendment under *Wilson v. Arkansas*, 514 U.S. 927 (1995)). But the federal common law found in *Hudson*

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keeping no-knock entries from becoming the norm in police work. After all, since it is supposedly "safer" (or maybe, more exciting) for policemen to use this method, why would they not do so in ***every*** case – unless it is legally discouraged? The importance of this issue alone justifies further articulation in full briefing before this Court under Texas law.

regarding suppression of evidence is without any bearing in our case.[5]

D. The Court of Appeals' ruling that there must be a "causal connection" between the illegal nature of the search and the acquisition of evidence is incorrect and therefore not grounds to ignore the requirements of CCP art. 38.23.

The COA cited two cases in which this Court has required a "causal connection" between the illegality of the search and the discovery of evidence before CCP §38.23 is triggered, *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App. 2002) and *Pham v. State*, 175 S.W.3d 767 (Tex.Crim.App. 2005). However, the analysis in those cases can be readily distinguished from our case.[6] There are only three types of searches:

1. legal (where evidence is obtained through legal process),
2. ineffective (where no evidence is obtained), and
3. illegal (where evidence is obtained through ***illegal*** process).

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[5] The lone TCCA case post-dating *Hudson* involved only ***federal*** law. *Wright v. State*, 253 S.W.3d 287 (Tex.Crim.App. 2008).

[6] Neither *Gonzales* nor *Pham* involved no-knock entries; both involved irregularities in the legal ***basis*** for conducting the search under the Family Code (akin to an invalid warrant), not illegality in the ***method*** of entry.

There is no need to suppress evidence unless evidence is found, so we can eliminate search type 2 from the analysis. Search type 1 does not result in suppression because everything was done correctly.

The exclusionary rule only applies, if ever, to search type 3. The exclusionary rule is a rule designed to discourage the police from conducting illegal searches by taking away the fruits of illegal searches, the theory being that if police cannot use ill-gotten evidence, they will be discouraged from using illegal means to acquire it, or, said a better way, they will be ***encouraged*** to use only ***legal*** means.

The only time the "legal-illegal" dichotomy is logically applicable to suppression, and where the defense could prove that but-for police illegality no evidence would have been discovered, would be in those situations where ***no search whatsoever*** would have occurred if legal steps were followed. And that would only occur (as in *Gonzales* and *Pham*) when the search is illegal because it was performed without a warrant or proper cause.[7] That is, if no search would have happened ***at all*** if the police had followed the law, then the defense could prove this "causal link" between the illegal police procedure and discovery of the evidence.[8]

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[7] See *Weeks v. U.S.*, 232 U.S. 383 (1914) and *New York v. Harris*, 495 U.S. 14(1990), two federal cases where the lack of a warrant was the "illegality" in question.

[8] Not that we need to go there, but the COA discussion of the relation between the "inevitable discovery" doctrine and the "causal connection" doctrine (see opinion, p. 6 fn 1) is also incorrect.

But to try to prove that evidence would not have been discovered if the police had knocked on the door instead of kicking it in is a fool's errand. The entry is always prior to the search itself, which means entry has always been ***completed*** when the search begins, regardless of the ***manner*** of entry. In addition to the logical impossibility of proving a negative, one cannot "prove" that the police would not have found something once they are in the premises ***because of*** the physical manner in which they entered it. The two things have nothing to do with each other. And, with due respect to the Court of Appeals, that is not the ruling in *Gonzales* or *Pham*. These issues need to be cleared up, and granting this Petition could assist in that goal.

2. The incorrect jury charge resulted in an improper conviction.

A. This Court has determined that the offense of possession is a two-element offense.

In *Blackman v. State*, 350 S.W.3d 588, 594 (Tex.Crim.App. 2008), this Court held that possession consists of two elements (brackets added):

The "causal connection" doctrine says the defense must prove that, but for the illegal nature of the search, the evidence would not have been discovered. The "inevitable discovery" doctrine says the defense must prove that, but for the illegal nature of the search, the evidence would not have been ***inevitably*** discovered. This is a distinction without a difference. Just because the Houston Court of Appeals got it wrong in *Callaghan* is no reason to continue making the same mistake.

> To prove the unlawful-possession-of-a-controlled-substance element of the charged offense in this case, the State was required to PROVE that:
> 1) appellant **[1A]** exercised control, management, or care over the three kilograms of **[1B]** cocaine; and **[2]** appellant knew that this was cocaine.

Element **[1A]** comes from Texas Penal Code §6.01, element **[1B]** comes from Texas Health & Safety Code §481.115(a), and element **[2]** (i.e., scienter) comes from Texas Penal Code §6.03(b)("... or that the circumstances exist").

Per *Blackman*, if a person knows he has a bag in his pocket, he cannot be convicted of possession of a controlled substance unless the state proves ***both*** that he knowingly possessed it ***and*** that he knows it is contraband. Possession is not a strict- liability offense. The scienter for the offense does not come merely from "knowing" that he possesses ***something*** in his pocket nor from the fact that the substance happens to be contraband, but from the defendant knowing that what is in his pocket is illegal. This is basic due process. While "ignorance of the law" is not an excuse (e.g., cocaine is illegal whether you know it is illegal or not), ignorance of what one has in his possession ***is*** a defense because unless the state proves he knows it is cocaine, the state does not meet its entire burden of proof per *Blackman*.

B. The jury charge does not contain the second element of the offense.

A jury charge must contain all the elements of the offense charged. *Francis v. Franklin*, 471 U.S. 307, 313 (1987)(proof of ***all*** elements of a crime beyond a reasonable doubt is required by the due process clause of the Constitution); *West v. State*, 572 S.W.2d 712, 713 (Tex.Crim.App. 1978)(leaving an offense element out of a jury charge, such as the culpable mental state, is a "fundamental error" and always results in reversal of a conviction), *Sanchez v. State*, 182 S.W.3d 34 (Tex.App. – San Antonio 2005), *affirmed* 209 S.W.3d 34 (Tex.Crim.App. 2006)(same).[9]

In this case, the jury was not charged correctly because it was only charged with requiring the State to prove elements [1A] and [1B] of the offense. CR 422 contains the relevant portion of the Jury Charge in this case:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of August, 2006, in Collin County, Texas, the defendant,

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[9] These errors are sometimes called "egregious errors." Courts assess harm from such errors carefully, and decide whether they: (1) affect the very basis of the case, (2) deprive the defense of a valuable right [such as having the jury charged using correct law?], or (3) vitally affect a defensive theory. *Warner v. State*, 245 S.W.3d 458, 462 (Tex.Crim.App. 2008). See also *Taylor v. State*, 332 S.W.3d 483, 489 (Tex.Crim.App. 2011)(same) and *Almanaz v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985)(case discussing the process for addressing jury-charge errors). This analysis was not performed by the Court of Appeals below, even though briefed. See Appellant's Brief, pp. 11-14. These errors cannot be waived.

> JOHN GERARD QUINN, did then and there [1A] intentionally and knowingly possess [1B] a controlled substance, namely: cocaine, in the amount of less than one (1) gram, by aggregate weight, including adulterants and dilutants, then you will find the defendant guilty as charged.

This sentence only requires proof [1A] that Mr. Quinn "intentionally and knowingly" ***possess*** the substance and [1B] that it be cocaine. It is an improper strict liability charge; the State does not have to prove [2] scienter: that he ***knew*** the substance was cocaine. Consider the charge under this hypothetical: if the State were to ***stipulate*** that the defendant did ***not*** know what the substance was, but if the State proved it was knowingly in his possession and that it was cocaine, would this charge still require the jury to find the defendtnat guilty, using ordinary English?[10] Yes, it would, and that proves the deficiency.

This is how the jury charge should have been written:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of August, 2006, in

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[10] "Intentionally" and "knowingly" are adverbs that only modify the verb "possess." There are no words in this charge language that require proof the defendant ***knows*** what it is he has in his possession.

> Collin County, Texas, the defendant, JOHN GERARD QUINN ***both***:
>
> (1) did then and there intentionally and knowingly possess a controlled substance, namely: cocaine, in the amount of less than one (1) gram, by aggregate weight, including adulterants and dilutants, ***and***
>
> (2) knew he was possessing a controlled substance, then you will find the defendant guilty as charged.

C. The jury's note allowed the court to correct the charge and foreclose error.

During deliberations, the jury sent a handwritten note out to the court asking if the crime required proof that the defendant knew that the substance was "illegal" (i.e., contraband). Here is the jury's note (all underlining in original; CR 426)(Appendix 15):

> In the 8th paragraph of cause 429-81971-09 it states:
>
> A person commits an offense only if he voluntarily engages in conduct, including an act, and omission, or possession. Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

> The Question: Does the possessor have to know the thing is illegal.

In response to this question, the trial court had the opportunity to fix the charge by answering the question "yes" as the defense urged. 10 RR 236 (Appendix 22). Amazingly, the State asked the court to tell the jury incorrect law by answering the question "no." *Id.* Without consensus from counsel, and perhaps due to its own ignorance of the law, the trial court gave the jury an ***incorrect*** response, telling the jury: "You have all the law and the evidence. Continue to deliberate." This response was incorrect because the jury did ***not*** have all the law; the charge does not require the State to prove element [2] of the offense, only element [1A] and [1B].

Consider this hypothetical: what if the trial court had followed the suggestion of the prosecutor and answered the question "no"? *Blackman* would say this would be misinforming the jury about the law. So, what was the harm in answering the question "yes"? If all that did was restate the correct law, or just clear up a jury-perceived ambiguity in the charge (an important purpose of jury questions), it would be a good thing to do or, at worst, it would be neutral. Instead, by telling a confused jury that it had "all the law," this was the equivalent of answering the question "no" – exactly as the prosecutor wrongfully urged.

D. The Court of Appeals wrongly speculated as to how the jury supposedly

"found" Mr. Quinn knew what he had in his safe.

The Court of Appeals tries to get the "knowledge of what it is" evidence from the circumstance that Mr. Quinn put the baggie into his safe, and says that the jury could have inferred from that location that Mr. Quinn "possibly knew" he possessed contraband. This analysis is flawed for two reasons.

First, a defendant does not have to overcome the ***possibility*** that the jury may have ruled as it did because of the evidence; that is another fool's errand and contrary to actual law:

> It is also well established that a conviction based on circumstantial evidence cannot be sustained if the circumstances ***do not exclude every other reasonable hypothesis except that of the guilt of the accused***, and proof amounting only to a strong suspicion or mere probability is insufficient.

Waldon v. State, 579 S.W.2d 499, 502 (Tex.Crim.App. 1979)(emphasis added). Here, there is a far more reasonable hypothesis about what happened other than guilt – especially in light of the jury's question – which proves reasonable doubt due to insufficient evidence.

Second, if the jury thought Mr. Quinn knew what the substance was, it would never have asked

the jury question. That is, if the jury had already inferred that Mr. Quinn knew the substance was contraband, what difference would it make whether that knowledge was or was not an element of the offense?

The only possible scenario under which the jury would have asked that question was:

(A) the jury did not believe Mr. Quinn knew he possessed contraband,

(B) they were going to acquit if his knowledge was a required element, and

(C) because the charge did not say that scienter was an element, and the judge, when asked, did not clarify that as being an element, they felt they had to convict even though they did not believe Mr. Quinn knew what the substance was because they were told, in effect, that this knowledge was irrelevant under "the law."

The Court of Appeals appears nonchalant about the logic of its conclusion. Here is what the Court of Appeals must believe happened:

> The jury asked the question about scienter regarding the nature of the substance even though it made no difference to their decision.

That is, since the jury had already inferred that Mr. Quinn knew the substance was contraband, they were merely ***curious*** as to whether that was something the State had to prove. This makes no sense.

Inferring what a jury did must be based on logic, or else we can just accept whatever our imaginations can dream up as a "reason" why they did what they did. In that world, sufficiency-of-the-evidence review becomes entirely meaningless. Juries have wide latitude, but they are not altogether unrestrained in coming to their decisions.

It defies logic to conclude that the jury did what the Court of Appeals says it might have done. Better is to consider the logic behind the jury's question and infer from that the basis for its question in the first place. When that is done, it is clear that the jury did ***not*** believe Mr. Quinn knew what he possessed and that they thought the law might (or should?) require that knowledge even though the charge did not tell them so, hence their question being "pretty astute" per Judge Oldner (Appendix 22). Then, when the trial judge refused to confirm that scienter was an element of the offense, they convicted on the single element the charge provided: [1A] knowledgeable possession of [1B] contraband.

The charge did not tell the jury they had to find proof of both elements of the offense, and the trial court failed to so inform them in response to the jury question. These are both fundamental, egregious errors that resulted in a conviction for possession against a man whom the jury almost-certainly found had no idea what he had in his possession.

Leaving out required elements from the charge is fundamental error per*Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App. 1995), and *Evans v. State*, 606S.W.2d 880, 883 (Tex.Crim.App. 1980),

overruled o.g., Woods v. State, 653 S.W.2d 1 (Tex.Crim.App. 1980)("A jury charge which authorizes a conviction without requiring the jury to find all of the elements of the offense charged is fundamentally defective."). See also *Sanchez, supra* (defendant's conviction for sexual assault reversed because the charge did not require the jury to find that the defendant knew his contact with the victim was unwelcome – the second element of ***that*** crime).

The Court is also referred to the Texas Pattern Jury Charge, Intoxication and Controlled Substances (Appendix 30-41). There, the authors show why the ordinary jury charge in possession cases, such as the one given in this case, is legally deficient:

> Current practice, the Committee concluded, too often ignores and even obscures the problem. Jury instructions are drafted in the statutory terminology, which simply passes the uncertainty of present law along to juries. . . . As a result, jury instructions too often do not reflect a clear and complete explanation of what the charged offense requires.

Because the jury charge in this case did not instruct the jury as to the scienter element of the offense charged, it contained fundamental, egregious, un-waive-able, Constitutional error and the conviction cannot stand. When the error came to the trial court's attention in the form of the jury question, the trial court's failure to correct that error was another fundamental/egregious error that caused a wrongful conviction, requiring reversal.

PRAYER

This Petition should be granted.

The evidence seized following the illegal no-knock entry should be ordered suppressed. The conviction based on that tainted evidence should be reversed and judgment of acquittal ordered per *Waldon*, 579 S.W.2d at 502.

The error in the jury charge for possession cases should be corrected for all future cases.
Petitioner also requests such other and further relief as is just.

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