

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARQUEZ, STEPHEN A. - PETITIONER

VS.

LORI DAVIS, STATE OF TEXAS - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS TO THE SUPREME COURT

With the decision to classify testimonial or non-testimonial statements per Crawford v. Washington 124 S.Ct 1354 as to whether Confrontation clause applies my questions are;

(a) Does Due Process to cross-examine still apply in all criminal cases when possible? (i.e not dying declarations, ongoing police emergencies, criminal activities such as co-conspirator conversation unknowingly wire tapped, or competency to stand trial) or has Due Process as guaranteed by the United States Constitutional Amendments Six and Fourteen also not applicable?

(b) Do business record privileges apply to medical records to nullify cross-examination and due process as guaranteed by the United States Constitution Amendments Six and Fourteen?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Texas Court of Appeals court appears at Appendix E to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 27 FEBRUARY 2018 (FIFTH CIRCUIT)

☒ ~~No~~ petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including JULY 27, 2018 (date) on MAY 8, 2018 (date) in Application No. 17 A 1238.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was August 17, 2016.
A copy of that decision appears at Appendix D.

☒ A timely petition for rehearing was thereafter denied on the following date: August 26, 2014, and a copy of the order denying rehearing appears at Appendix E.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including July 27, 2018 (date) on May 8, 2018 (date) in Application No. 17 A 1238.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

SCT

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVE

U.S. CONST. AMEND ARTICLE [v]

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND ARTICLE [vi]

In 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, and to be informed of the nature and the cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No 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; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a Circuit judge, or a district Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that--

(A) The applicant has exhausted the remedies available in the Court of the State; or

(B)(i) There is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through Counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the

question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court, a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the Court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State Court proceeding to support the State Court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal Court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the Court shall determine under the existing facts and circumstances what weight shall be given to the State Court's factual determination.

(g) A copy of the official records of the State Court, duly certified by the clerk of such Court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State Court shall be admissible in the Federal Court proceeding.

(h) Except as provided in section 408 of the Controlled substances Act, in all proceedings brought under this section, in any subsequent proceedings on review, the Court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a

rule promulgated by the Supreme Court pursuant to statutory.
Appointment of counsel under this section shall be governed by
section 3006A of title 18.

STATEMENT OF THE CASE

The Grand Jury of Hays County indicted Stephen Marquez (Marquez) on October 3, 2012. The indictment consisted of three counts of penetrating the sexual organ of a child younger than fourteen years old. On May 14, 2013 a jury trial convened. The jury found Marquez guilty on all three counts on May 17, 2013 and was sentenced to fifty years in prison and fined \$10,000 on each count. The sentences are running concurrently. The Third Court of Appeals affirmed the conviction on August 26, 2014. The Court of Criminal Appeals of Texas denied habeas corpus without written order on 8/17/2016. The United States District Court for the Western District of Texas (USDC) affirmed the decision and denied a certificate of appealability (82254). On July 5, 2017 the USDC denied Marquez's Motion to Amend Judgment and certificate of appealability. On February 27, 2018 The United States Court of Appeals Fifth Circuit denied certificate of appealability. An extension of time motion to file a writ of certiorari in the Supreme Court was granted on May 8, 2018 extending the time until July 27, 2018.

REASONS FOR GRANTING THE PETITION

The State of Texas has used what was created as non-testimonial in a testimonial manner in order to prove past events without cross-examination of the evidence reability and meaning. Petitioner believes the United States Constitution still requires due process and cross-examination under the Sixth and Fourteenth Amendment when medical records are used to prove the truth of the matter asserted. These grounds for due process and cross-examination are in petitioners state habeas pleadings and argument. In Pointer v. Texas, 380 U.S. 400 (1965) MR. JUSTICE HARLAN says in his Opinion and I quote:

"I join in the judgment reversing this conviction, for the reason that the petitioner was denied the opportunity to cross-examine, through counsel, the chief witness for the prosecution. But I do not join the Courts pronouncement which makes the Sixth Amendment right of an accused to confront the witness against him,,, obligatory *410 on the States. That questionable tour de force seems to me entirely unnecessary to the decision of this case, which I think is derectly controlled by the Fourteenth Amendment's guarantee that no State shall" deprive any person of life, liberty, or property, without due process of law"

In petitioner's case there was no opportunity to cross-examine the authoring physicians or even the custodian of records by use of evidentiary rulings such as business record exception and hearsay exceptions (Tex R. Evid 801,803). The result being authoring physicians were never available in court

REASONS FOR GRANTING THE PETITION

to be asked why they wrote what they wrote, who was he referring to, when, etc. That privilege was left to the state prosecutors. This resulted in misdirecting the jury and committing material error(s) likely to injure the defendant's rights and a verdict contrary to the law and the evidence. such evidentiary rulings contributed to the jury verdict and were not harmless.

These arguments seem to be granted by written order but not given a new trial. (See Federal Records On Appeals Vol 3 of 3 U.S.C.A #17-50526. 1847 and 1838,1839,1843,1845) also* which substantiates these assertions and all petitioner's grounds for habeas relief.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendant's a meaningful opportunity to present a complete defense. Crane v. Kentucky 476 U.S. 683, 690, 105 S.Ct 2142. This right is abridged by evidence rules that infringe upon a mighty interest of the accused and are arbitrary or disproportionate to the purpose they are designed to serve, Scheffer Supra at 308 118 S.Ct 1261"

The Supreme Court has held that if the supplier of information is outside the business and has no business duty to report it then the information is not protected by exception to hearsay and a report thus prepared is inadmissible Johnson v. Lutz 253 N.Y. 124, 170 N.E. 517 (1938) (See also U.S. v. Ismoile

REASONS FOR GRANTING THE PETITION

100 F.3d 380 Federal Rule 603(6) (28 U.S.C.A.) The petitioner was a patient not employee providing the information.

The Supreme Court has not provided a complete definition of what statements qualify as "testimonial" under Crawford 541 U.S. 36,68. The Court attempted to clarify the definition of "testimonial" in Davis v. Washington 547 U.S. at 822, concluding that a statement is testimonial when, in the totality of the circumstances, police interrogation is not in response to an ongoing emergency, but rather meant to investigate past events potentially relevant to criminal proceedings. This is the exact way petitioner's medical records were used. The petitioner's case did not go to trial for approximately four years after the medical records were made. Testimonial by the Davis v. Washington opinion.

The Texas Courts and the U.S.D.C Western District of Texas and the Fifth Circuit have decided an important question of federal law that have not been, but should be, settled by this Court and has decided an important federal question in a way which conflicts with relevant decisions of this Court. Namely that cross-examination is not a right guaranteed by the Sixth or Fourteenth Amendments of the United States Constitution, and business record exception to hearsay applies to medical records.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, *Stephen A. Marquez*

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Date: July 27, 2018