No. _____

In the

Supreme Court of the United States

_____

Ryan Jason Brannon,

Petitioner,

v.

State of Texas,

Respondent.

_____

On Petition for a Writ of Certiorari
from the 7th Court of Appeals of Texas

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether the plain language of the Sixth Amendment's Confrontation Clause gives a defendant the literal right to confront and cross-examine their accuser at trial when the accuser is alive and legally available to testify.

PARTIES TO THE PROCEEDING

Petitioner is Ryan Jason Brannon, who was the Defendant-Appellant in the court below. Respondent, the State of Texas, was the Plaintiff-Appellee in the court below.

LIST OF ALL PROCEEDINGS

In the 100th District Court of Childress County, Texas
Cause 6507
The State of Texas v. Ryan Jason Brannon
February 5, 2020

In the 7th Court of Appeals of Texas in Amarillo, Texas
Cause 07-20-00078-CR
Ryan Jason Brannon, Appellant vs. The State of Texas, Appellee
December 10, 2020

In the Court of Criminals Appeals of Texas
Cause PD-0019-21
Ryan Jason Brannon, Petitioner vs. The State of Texas, Respondent
February 10, 2021

TABLE OF CONTENTS

INDEX TO APPENDICES

Table of Authorities

Cases

Statutes

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan Jason Brannon seeks a writ of certiorari to review the opinion of Texas's 7th Court of Appeals in Amarillo, Texas.

OPINIONS BELOW

The Texas Court of Criminal Appeal's unpublished refusal of discretionary review from February 10, 2021, is attached as Appendix A and may be found at search.txcourts.gov under case number PD-0019-21. The unpublished opinion of the 7th Court of Appeals of Texas from December 10, 2020, is attached as Appendix B and may be found at search.txcourts.gov under case number 07-20-00078-CR. The 100th District Court's judgment and sentence from February 5, 2020, is attached as Appendix C.

JURISDICTION

This Court has jurisdiction pursuant to Article 3, Section 2 of the United States Constitution, §25 of the Judiciary Act of 1789, and the 14th Amendment because this is a federal Constitutional question and the State remedies have been exhausted.

The memorandum opinion of the 7th Court of Appeals of Texas was issued on December 10, 2020. The Texas Court of Criminal Appeals refused discretionary

review on February 10, 2021. On March 19, 2020, the United States Supreme Court issued an Order (589 U.S.) stating:

> "IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3."

The 150th day from the refusal of discretionary review would be July 10, 2021.

The 90th day from the refusal of discretionary review would be May 11, 2021.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to… be confronted with the witnesses against him….

> The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of 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.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

Petitioner Ryan Jason Brannon was convicted for assault family violence and received a sentence of 20 years confinement in Texas Department of Criminal Justice — Institutional Division. *See* Reporter's Record, Vol 3 at 118-119. Trial began on February 4, 2020 and ended on February 5, 2020 in the 100th District Court in Childress, Texas.

Vague and ambiguous testimonial and non-testimonial hearsay statements made by the accuser — the only eyewitness — were obtained after the emergency had passed and during law enforcement's investigation and the accuser's subsequent medical treatment. These hearsay statements were offered during trial without the accuser ever being subpoenaed or called to testify in an attempt to establish that Petitioner was the one who assaulted his ex-girlfriend's son. *See* Entire Reporter's Record.

A few weeks prior to April 14, 2019, Petitioner and his pregnant girlfriend broke up and Petitioner moved out of her house. *See* Reporter's Record, Vol 2 at 210-211. Petitioner's ex-girlfriend, the accuser's mother, testified that though Petitioner no longer lived there, Petitioner occasionally spent the night and had spent the night on April 13, 2019. *See* Reporter's Record, Vol 2 at 216. The State alleged that on April 14, 2019, the Petitioner went into the victim's room for an unknown reason and grabbed the victim by the throat. *See* Reporter's Record, Vol 2 at 121-124 and Vol 3 at 63-65. Petitioner's ex-girlfriend testified that she did not

hear an altercation and did not see an assault, but did hear a cabinet door open and found Petitioner in the hallway outside the accuser's room. *See* Reporter's Record, Vol 2 at 213-14. She testified that she an Petitioner then had an argument. *See* Reporter's Record, Vol 2 at 217-18.

Petitioner's ex-girlfriend did not call the police. Instead she called a male friend who arrived later, after the emergency was over. They drove around the block and then the friend called the police. *See* Reporter's Record, Vol 2 at 218-19. The police called for an ambulance. *See* Reporter's Record, Vol 2 at 134. The victim's vague and ambiguous hearsay statement to the police that "he" did it was admitted over objection. Id. The officer testified that he did not know who "he" was. Id. The victim's vague and ambiguous hearsay statement to the EMT that his "mom's boyfriend" did it was admitted over objection. *See* Reporter's Record, Vol 2 at 173. The victim's vague and ambiguous hearsay statement to the nurse at the emergency room that "he" did it was admitted. *See* Reporter's Record, Vol 2 at 186. The nurse asked the victim if "Randy" did anything else. *See* Reporter's Record, Vol 2 at 186-87. It should be noted that the victim did not correct the nurse and that the Petitioner's name is not Randy. *See* Reporter's Record, Vol 2 at 186-87.

The victim's mother, Petitioner's ex-girlfriend, has two children (ages 7 and 3 months) by two different men and admitted that she and Appellant had broken up a few weeks before April 14, 2019, so Appellant was not "mom's boyfriend" at the time of the offense though she was pregnant with a child she believes is Petitioner's. *See* Reporter's Record, Vol 2 at 208-211. At the time of trial, the victim's father had

been in prison for more than half of the victim's life. See Reporter's Record, Vol 2 at 209.

The police searched, but the Appellant was not found in or near the home. *See* Reporter's Record, Vol 2 at 137-38.

The State rested without calling the victim to testify even though he was alive and legally available to testify. There was never any allegation or argument that the victim, and only eyewitness to the incident, was not available to testify. There was no finding by the trial court that the victim was unavailable to testify. *See* Entire Reporter's Record.

It should be noted that pursuant to Maryland v. Craig, 497 U.S. 836 (1990), the State could have moved for the Court to allow the only eyewitness to testify by closed circuit television due to his age, but the State made no such motion. Therefore, the trial court did not make the requisite findings. *See* Entire Reporter's Record. The State simply chose not to present the only eyewitness in violation of the Confrontation Clauses of both the U.S. Constitution and Texas Constitution.

Later, during closing arguments, the State told the jury that the jury had "heard" from the accuser and only eyewitness, but in fact, they never did. *See* Reporter's Record, Vol 3 at 63. They merely heard vague and ambiguous testimonial and non-testimonial hearsay. *See* Entire Reporter's Record. The State admitted during closing arguments that they did not call the accuser to testify — not because he was unavailable — because he might not tell the story they wanted him to tell. *See* Reporter's Record, Vol 3 at 65. The State said that the accuser

should not have to testify and be forced to choose "between… his mother… and… the truth." Id. The plain language of the Confrontation Clause of the Sixth Amendment does not grant any such loophole.

When the State rested, Petitioner's trial counsel made a motion for a directed verdict on the basis of the violation of his Sixth Amendment Constitutional right to confront his accuser. He said:

> "I would ask that this case right here be acquitted under the Constitution rule of the right of confrontation, which the State did not produce B.; and therefore, I think it's a violation of my client's right to confrontation. I would be asking that he be acquitted under that rule."

See Reporter's Record, Vol 3 at 61.

Petitioner's trial counsel failed to use the words "directed verdict," but magic words have never been required to obtain justice as long as the meaning of the words are understood. A directed verdict would have resulted in an acquittal. Trial counsel's meaning was abundantly clear to the trial court who "overruled and denied" it. *See* Reporter's Record, Vol 3 at 61.

B. Appellate Proceedings

Petitioner's trial counsel timely filed a notice of appeal and petitioner filed the proper affidavit with the court to prove indigency, so appellate counsel was appointed by the court.

Petitioner appealed, arguing that the district court erred in overruling and denying the motion for a directed verdict on the basis of the violation of his Sixth

Amendment Constitutional right to confront his accuser, who is also the only eye-witness. *See* Appellant's Brief at 16-34.

In his appeal, Petitioner relied on the plain language of the Sixth Amendment of the United States Constitution as well as Mattox v. United States, 156 U.S. 237 (1895) (the fundamental purposes of the Confrontation Clause), Delaney v. United States, 263 U.S. 586 (1924) (the only exception to the Constitutional right to confrontation is if a witness is dead), Barber v. Page, 390 U.S. 719 (1968) (a common law exception exists when a witness is unavailable and had testified under oath during prior judicial proceedings subject to cross-examination by that same defendant), Chambers v. Mississippi, 410 U. S. 284, 410 U. S. 295 (1973) (a defendant has a literal right to cross-examine witnesses against him face-to-face), Ohio v. Roberts, 448 U.S. 56 (1980) (a witness must be unavailable before a hearsay statement may be considered to be admitted into evidence), Kentucky v. Stincer, 482 U.S. 730 (1987) (the defendant has a Constitutional right to face-to-face confrontation at some point in the proceedings), Coy v. Iowa, 487 U.S. 1012 (1988) (reaffirmed that a defendant has an absolute "irreducible literal" right to confront the witnesses against him face-to-face), Crawford v. Washington, 541 U.S. 36 (2004) (the text of the Sixth Amendment establishes a *per se* right to cross-examination and "does not suggest any open-ended exceptions… to be developed by the courts"), Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (a criminal defendant must have the opportunity to cross-examine testimony that has been made against him), and

Maryland v. Craig, 497 U.S. 836 (1990) (on motion by the State, a child victim may be allowed to testify by closed circuit television if the judge determines that face-to-face confrontation could result in serious emotional distress for the child). *See* Appellant's Brief at 18-25.

Throughout his Brief, Petitioner acknowledged that if a witness is unavailable through death or one of the other excuses allowed by Rule 804 of the Texas Rules of Evidence, then obviously that witness need not testify and a conviction may be lawfully obtained in the absence of that witness. *See* Appellant's Brief at 19, 21, 25-27. However, Petitioner demonstrated in his Brief that neither death nor any of the other excuses allowed by Rule 804 were asserted by the State during any proceeding regarding Petitioner's accuser. *See* Appellant's Brief at 26-27. The accuser was legally available to testify, but the State chose not to produce him at trial.

Additionally, Petitioner argued on appeal that the State could have made a motion to allow the accuser to testify by closed circuit television due to his age under Maryland v. Craig, but chose not to do so. *See* Appellant's Brief at 32.

Furthermore, Petitioner demonstrated that the majority of hearsay statements made by the accuser and offered by the State during trial were clearly testimonial according to the holdings in Crawford[1] and Melendez-Diaz[2] and therefore must be subjected to cross-examination. *See* Appellant's Brief at 31-32.

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[1] Crawford v. Washington, 541 U.S. 36 (2004)

[2] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

Petitioner argued in his brief that regardless of the testimonial or non-testimonial nature of the hearsay offered at any trial, the plain language of the Sixth Amendment and centuries of jurisprudence, require a legally available witness against the accused to be produced at trial and subjected to the "crucible of cross-examination." *See* Appellant's Brief at 33 and Crawford v. Washington, 541 U.S. at 36 at 61 (2004).

The 7th Court of Appeals of Texas affirmed the conviction on December 10, 2020. The Court of Criminal Appeals refused petitionary review on February 10, 2021.

In the 7th Court's opinion, authored by Chief Justice Brian Quinn, the Court struck at Petitioner over counsel's shoulder[3] by mocking trial counsel for asking for an acquittal instead of saying the words "directed verdict." See 7th Court of Appeals Opinion at 2-3.

The 7th Court of Appeals also rejected Petitioner's federal Sixth Amendment argument that the plain language of the Confrontation Clause along with centuries of jurisprudence make clear that every defendant has the right to confront and cross-examine legally available accusers with the following commentary:

> "…we know of no authority imposing upon the State a blanket obligation to present the victim in person to secure a guilty verdict. And, none of the authority cited by appellant creates such a blanket rule."

See 7th Court of Appeal Opinion at 3.

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[3] It should be noted that in Texas, if done by a prosecutor, striking at a defendant over counsel's shoulder is prosecutorial misconduct. How much more demeaning to our system of justice is it when an appellate court does it?

The 7th Court then entirely ignored the fact that appellate counsel stated clearly in the brief that only living and legally available witnesses must be called to testify in order to satisfy the requirements of the Confrontation Clause. *See* Appellant's Brief at 19, 21, 25-27 when the 7th Court stated:

> "Indeed, if the right to confront were to impose a blanket requirement that the victim testify as a condition to conviction in every case, as appellant may be suggesting, then the State could never obtain a conviction against one accused of murder; as the old adage says, 'dead men tell no tales.' So, we reject this aspect of what appellant may be arguing.

See 7th Court of Appeal Opinion at 3. The 7th Court of Appeals then went on to state that there was no error in admitting any of the hearsay statements because Petitioner's trial attorney failed to object to hearsay at one point and that would have remedied the error in the other admitted hearsay.

It is true that once during trial, Petitioner's trial counsel did not object to hearsay that fell into a recognized hearsay exception and Petitioner further agrees that the admission of one hearsay statement may have cured error in the admission of other hearsay statements. However, whether the admission of hearsay triggered Confrontation Clause considerations is not the primary issue in this case. The primary issue is that the plain language "irreducibly literal"[4] guarantee of the Sixth Amendment's Confrontation Clause. According to all of the United States Supreme Court cases and the plain language of the Sixth Amendment, no amount of hearsay — be it testimonial or non-testimonial, admissible or inadmissible — exterminates

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[4] Coy v. Iowa, 487 U.S. 1012 at 1016 (1988) and California v. Green, 399 U. S. 149 at 175 (1970).

the accused's right to confront and cross-examine his accuser when the accuser is alive and legally available to testify.

REASON FOR GRANTING THE PETITION

I. The plain language of the Sixth Amendment's Confrontation Clause gives a defendant the literal right to confront and cross-examine their accuser at trial when the accuser is alive and legally available to testify.

The United States Supreme Court has always relied primarily on the plain language rule when interpreting a law. "In determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning." Moskal v. United States, 498 U.S. 103, 108 (1990).

The plain language of the Sixth Amendment's Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him…." This applies to the States by way of the 14th Amendment.

Confrontation of alive and legally available witnesses is the Constitutionally guaranteed meat of our justice system. Admissible hearsay is the gravy afforded to us by the rules of evidence.

There are three different categories of Confrontation Clause cases in Supreme Court jurisprudence.

The first category comprise cases dealing with the admissibility of various forms of hearsay. *See* Ohio v. Roberts, 448 U. S. 56 (1980); Dutton v. Evans, 400 U. S. 74 (1970). Crawford v. Washington, supra, and its progeny fall into this first category. The second category are cases dealing with restrictions on the scope of

cross-examination. *See* Delaware v. Van Arsdall, 475 U. S. 673 (1986); Davis v. Alaska, 415 U. S. 308 (1974). Cf. Delaware v. Fensterer, 474 U. S. 15, 474 U. S. 18-19 (1985) (per curiam) (noting the first two categories of hearsay cases "…and the Court's longstanding recognition that the literal right to confront the witnesses at the time of trial"). In the first two categories, "there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those element [admissible hearsay and restrictions on cross-examination]…." Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

By contrast, in the third category are the cases in which the plain language of the Confrontation Clause has been utterly ignored by the State — just like in Petitioner's case. "It is '[s]imply as a matter of English,' that the Confrontation Clause confers at the very least 'a right to meet face to face all those who appear and give evidence at trial.'" Coy at 1016 quoting California v. Green, 399 U. S. 149 at 175 (1970). *See* Kentucky v. Stincer, 482 U. S. 730 at 748 (1987); Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Lee v. Illinois, 476 U.S. 530 (1986); Pointer v. Texas, 380 U.S. 400 (1965) (held that the Sixth Amendment required Texas to allow Pointer to confront the witness through counsel).

The case at bar falls into the third category of cases: that it is "simply a matter of English" that there is a "literal right to confront the witnesses at the time of trial." Green, 399 U.S. at 175 and Coy, 487 U.S. at 1016.

In Coy v. Iowa, the Court stated:

> "The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him.' This language 'comes to us on faded parchment,' California v. Green, 399 U. S. 149 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated:
>
> > 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.'
>
> Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial….. We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."

Coy, 487 U.S. at 1015-16 (citations omitted).

The opinion in Coy was "embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' *What was true of old is no less true in modern times*." Id. at 1017 quoting Pointer v. Texas, 380 U. S. 400 at 404 (1965) (emphasis added).

The Court in Coy held that a child accuser could not be hidden behind a screen while testifying in Court. However, in Coy, the trial court never made a finding that face-to-face testimony would be traumatic for the child. Two years later in Maryland v. Craig, 497 U.S. 836 (1990), the child victim was physically present, under oath, subjected to cross-examination, the witness's demeanor could be observed by the trier of fact, and the defendant was in constant electronic

communication with his attorney who was in the room with the child. Most importantly, the trial court in Maryland made a specific finding that face-to-face confrontation would be traumatic for the child. Under those conditions, the Court held that closed circuit television testimony, under conditions that assured the testimony's reliability and subjected it to "rigorous adversarial testing" in a manner functionally equivalent to live in-person testimony, did not impinge upon the Confrontation Clause's truth-seeking purposes. Id. at 844-852.

Then in 2004, Crawford v. Washington, 541 U.S. 36 (2004), was decided and thereafter, the right to what constitutes admissible hearsay in the absence of confrontation became murky. This Court has continued to use Crawford's progeny to define and clarify what constitutes testimonial hearsay.

However, once again the issue in Petitioner's case is not primarily whether the accuser's vague and ambiguous hearsay statements were testimonial and thus triggered Confrontation Clause considerations. The primary issue in this case is whether Petitioner (or any criminal defendant in America for that matter) still has a literal, plain language, Constitutional right to confront the witnesses against himself at trial when those witnesses are alive and legally available to testify. Nevertheless, a brief recitation of the Court's Confrontation Clause cases since Crawford is useful because courts across America have failed to understand that Crawford and it's progeny fall into merely one category of Confrontation Clause cases — the admissibility of certain types of hearsay when the declarant is unavailable to testify at trial. Some courts, including the court in Petitioner's case,

have failed to understand that any amount of admissible hearsay, whether testimonial or not, will never exterminate a defendant's Constitutionally guaranteed right to literal confrontation when a witness is alive and legally available to testify.

Crawford designated a type of hearsay — testimonial hearsay — as inadmissible under traditional hearsay exceptions unless the declarant was available to testify under oath and subject to the "crucible of cross-examination." Crawford, 541 U.S. at 61. Neither Crawford nor any other case in the history of the United States Supreme Court ever held that someone can be convicted on admissible non-testimonial hearsay alone when the witness is alive and legally available to testify, but does not testify.

Crawford, began with a recitation of the plain language of the Confrontation Clause and then held that testimonial statements of witnesses who are absent from trial were only admissible if the witness was legally unavailable to testify and only if the defendant had a prior opportunity to cross examine the witness. Id. at 68. In Crawford, the defendant's wife made an "ambiguous" statement to the police that was later admitted into evidence under a hearsay exception. Id. at 39-40. This Court held that the defendant's right to confront his wife, who was unavailable due to marital privilege, thus clearly included the right to cross-examine her statement — especially in view of the "ambiguity" in the statement. Id. at 67. Crawford stated that the right to confrontation is not a substantive guarantee that evidence

be reliable, but rather a procedural guarantee that the reliability of the wife's statement be tested by cross-examination. Id. at 61.

> "Dispensing with confrontation because [other] testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Crawford at 61-62. In Crawford, the Court overturned the Ohio v. Roberts[5] reliability test for admissibility of hearsay statements and held that the Confrontation Clause "commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Crawford at 61.

It should be noted that while Crawford overturned the reliability test from Roberts, it did ***not*** overturn the literal, plain language, Constitutionally guaranteed right to confront an alive and legally available accuser. In fact, Crawford made it clear just how integral "the crucible of cross-examination" is to our justice system. Crawford still required the Constitutional meat of live testimony subject to cross-examination, while allowing the gravy in the form of non-testimonial admissible hearsay.

Three years after Crawford, the Court decided Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (2006) together. The Court used these two cases to try to flesh out the definition of "testimonial" hearsay. Like Crawford, these two cases fall in the first category of Confrontation Clause cases, the admissibility of hearsay, and not in the final and most literally guaranteed category: the right to

[5] 448 U.S. 56 (1980).

confront and cross-examine witnesses when they are alive and legally available to testify.

In Davis, the Court contrasted the two cases and defined testimonial hearsay as statements made "when the circumstances objectively indicate that there is no… ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 820.

In Davis, the victim called 911 right after she was assaulted by Davis. When the police arrived they noticed fresh injuries and the victim was frantically trying to gather her belongings and her children to leave the house. Davis at 815-6. Only the two police officers testified and they could not say how she got her injuries. The State used the 911 call to show how she got her injuries. Id. at 816. Davis objected to the hearsay contained within the 911 calls on the basis of the Confrontation Clause. Id. at 816. The trial court overruled his objection and Davis was convicted. Id. The Court held that the hearsay was not testimonial because there was an ongoing emergency and its admission therefore did not violate the Confrontation Clause. Though the Court did state that once the 911 operator began asking questions, it became testimonial at that time. Id. at 827. The Court did note that presumably the victim could have testified. However, the issue raised on appeal was whether the statements were testimonial and not whether there was a violation of the irreducible plain language of the Confrontation Clause because of the absence

of a legally available witness. That issue would finally be raised by a different case in 2011.

In Hammon, the police responded to the victim's home where she was alone on the porch and stated that nothing was the matter. Davis, 547 U.S. at 817. The victim was questioned apart from her husband and wrote out a sworn affidavit about what had happened. Id. The State subpoenaed the victim, but she did not show up. Id. at 817-8. The police officer testified and authenticated the affidavit. Id. at 818. Defense counsel repeatedly objected to because it could not be cross-examined and therefore violated the Confrontation Clause. Id. The trial court admitted the affidavit as a present sense impression and the statements made to the officer as excited utterances and noted that those exceptions to the hearsay rule are "expressly permitted… even if the declarant is not available to testify." Id. The Court held that the hearsay was testimonial in nature because there was no on-going emergency when she spoke to police. Id. at 828. However, again the Court was only asked to address whether the hearsay statements were testimonial and not to address the fact that there was a violation of the irreducible literal plain language guarantee of the Confrontation Clause because the accuser ignored her subpoena, the State did nothing to try to find her, and the trial court never ruled she was unavailable.

Next came Giles v. California, 554 U.S. 353 (2008), which held that a murdered woman's testimonial hearsay statements were inadmissible because the

doctrine of forfeiture applies only to situations wherein the defendant causes the witness's absence in order to prevent the witness from testifying.

Then in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Briscoe v. Virginia, 558 U.S. 1316 (2010), the Court held that a lab report on drugs prepared by the State's forensic lab to be used in a criminal prosecution is testimonial and subject to the Confrontation Clause because they constitute affidavits.

In Bullcoming v. New Mexico, 564 U.S. 647 (2011), the Court held that the State must call the analyst who preformed the blood alcohol test at the lab because the accused's Sixth Amendment Right is to confront that analyst and not another one from the same lab.

In 2011, Hardy v. Cross, 565 U.S. 65 (2011), finally addressed the question that was not asked in Davis and Hammon, *supra*. The victim in Cross was terrified to testify, but did so in a trial that ended in a mistrial. Id. at 66. When the State tried the case again, the victim could not be located. Unlike the State in Davis and Hammon, supra, and also unlike the State in Petitioner's case, the State in Cross conducted an exhaustive search for the victim and, when she could not be found, moved to have her declared legally unavailable by the trial court so that her prior testimony, which took place under oath and subject to cross-examination, could be read into the record. Id. at 67-68. The trial court made the appropriate findings on the basis of the extensiveness of the State's search and Cross was convicted. Id. at 69. The appellate court affirmed and the United States Supreme Court denied certiorari. Thereafter, Cross filed a writ of habeas corpus which was denied by the

District Court, but reversed by the Seventh Circuit because there were unlikely avenues that had not been exhausted in the State's search for the witness. Id. The Supreme Court reversed the Seventh Circuit and held that the Confrontation Clause does not require the State to exhaust every possible avenue of inquiry, no matter how unlikely. Id. at 71-72.

Michigan v. Bryant, 562 U.S. 344 (2011), held that the identification and description of the shooter given to police by the victim who later died was non-testimonial hearsay given to police during an on-going emergency and was admissible under the dying declaration exception. Therefore, it did not violate the Confrontation Clause.

In Williams v. Illinois, 567 U.S. 50 (2012), DNA swabs were taken in a rape case before a suspect was identified. The Court held that the DNA profile was not inherently inculpatory as the tests in Melendez-Diaz, Briscoe, and Bullcoming had been because, unlike blood alcohol tests and drug tests, the DNA profile tends to exculpate all but one of more than 7 billion people in the world today. Additionally, an expert who did not conduct the lab tests on the DNA swaps was allowed to testify that she relied on those tests when forming the basis of her opinion without violating the Confrontation Clause.

In Ohio v. Clark, 576, U.S. 237 (2015), this Court narrowed the Crawford standard for determining whether hearsay statements triggered Confrontation Clause concerns. The 3 year old victim's preschool teacher noticed injuries on his face and made inquiries about their origin. The 3 years old implicated Clark. The

teacher then reported her concerns to the child abuse hotline and the police responded. Eventually Clark was convicted of child abuse. The trial court ruled that the 3 year old was incompetent to testify, so the State used the teacher to establish the identity of the perpetrator. The Court held that the Confrontation Clause was not triggered by this use of this hearsay identification because there was an on-going emergency to prevent the release of the child into his abuser's hands. It should be noted that the accuser in Clark was legally unavailable to testify based on the trial court's finding.

In Petitioner's case, much like in Davis and Hammon, supra, the distinction between the categories of Confrontation Clause cases was misunderstood by the Texas courts and that misunderstanding was used to deny Petitioner the Constitutionally guaranteed, irreducibly literal, plain language right to confront his living and legally available accuser at trial — particularly in light of the vague and ambiguous hearsay statements that were admitted at Petitioner's trial.[6] Davis and Hammon only asked this Court to define testimonial hearsay. Neither Davis nor Hammon asked this Court to consider the Constitutional violation of their legally available accusers failing to testify. However, Mr. Brannon is asking this Court to focus primarily, if not solely, on the State's denial of his irreducibly literal, plain language, Constitutionally guaranteed right to confront his accuser.

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[6] Crawford, 541 U.S. at 67 stated that the statement made in Crawford was "ambiguous" and needed cross-examination to clarify the statement and yet it was not nearly as ambiguous as any of the hearsay statements admitted into evidence in Petitioner's case.

According to the Court's decisions in Davis and Hammon, *supra*, the vague and ambiguous hearsay statements admitted into evidence in Petitioner's case were testimonial because they were made well after the emergency was over. Plenty of time had passed while the victim's mother called a male friend who drove over to her house.[7] He picked up them up and drove around the block[8] and then finally, the friend called the police.[9] Additionally, the vague and ambiguous hearsay statements were made by a child whose father is in prison and who is being raised by a mother who is "not big on calling the police."[10] All children know that if you tell on someone to law enforcement, doctors, or nurses, then they will get in trouble. However, once again, the admission of hearsay and whether or not it was testimonial is not the primary issue in Petitioner's case. The primary issue in Petitioner's case is that he was denied his "irreducibly literal"[11], plain language, Constitutional right to confront his accuser at trial.

Unlike Maryland v. Craig, *supra*, in Petitioner's case the State did not ask the trial court to make a finding that testifying would be traumatic for the victim which would have allowed him to testify by closed circuit television.

Unlike Clark, *supra*, the State did not ask the trial court to find that the accuser in Petitioner's case was legally incompetent to testify.

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[7] See Reporter's Record, Vol 2 at 218-219.

[8] See Reporter's Record, Vol 2 at 218-219.

[9] See Reporter's Record, Vol 2 at 218-219.

[10] See Reporter's Record, Vol 2 at 219-220.

[11] California v. Green, 399 U. S. 149 at 175 (1970).

Unlike in Cross, *supra*, the State did not do an exhaustive search for the witness because in Petitioner's case because the witness was not lost. Additionally, the State did not ask the trial court to make a finding that the witness was unavailable because in this case he was entirely available.

Davis and Hammon, *supra*, along with Petitioner's case demonstrate that there is an emerging trend in America wherein the State secures convictions on hearsay alone to the exclusion of the Constitutionally guaranteed, "irreducibly literal," plain language right contained in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to… be confronted with the witnesses against him…." In Petitioner's case, the State had an obligation to act like the State did in Cross, *supra*, and do their very best to make sure an alive and legally available accuser was present at trial to testify. The State did not because they did not want to. Petitioner respectfully requests that this Court grant certiorari and stop this trend right now while it is in its infancy.

The rule in Texas and in the Federal system is that hearsay is inadmissible and then there are exceptions to that rule.[12] As Petitioner's case demonstrates, hearsay is quickly becoming the State's preferred form of evidence in their fight to secure convictions by any means necessary. Furthermore, as the 7th Court of Appeals of Texas's opinion demonstrates, the appellate courts in Texas claim to "… know of no authority imposing upon the State a blanket obligation to present the

[12] FRE 802 and TRE 802.

victim in person to secure a guilty verdict."[13] As a result, people like the Petitioner are being convicted solely on the basis of gossip, rumors, and innuendo.

In attempting to describe the Constitutional error in Petitioner's case to non-lawyer friends, Petitioner's appellate counsel used the following hypothetical:

> Y tells Z she saw X at the gas station. The gas station is robbed and X is arrested. At trial, if Y is dead or otherwise legally unavailable to testify, then obviously the State's only option is to call Z to testify to what Y said she saw. However, at trial, Y is very much alive and just down the street, but instead of calling Y to testify, the State chooses to just call Z to testify about what Y saw. X was convicted on the basis of gossip, rumor, and innuendo.

Obviously, this hypothetical offends everyone's notions of justice and fair play, but it is exactly what happened in Petitioner's case.

The plain language of the Sixth Amendment's Confrontation Clause and no less than ten United States Supreme Court cases were provided to the 7th Court of Appeals of Texas in Appellant's Brief. Every single United States Supreme Court case cited in Appellant's brief, beginning with Mattox in 1895 and continuing through Melendez-Diaz in 2009, made it clear that the Sixth Amendment right to confrontation and cross-examination is absolute unless a witness is legally unavailable. In Appellant's brief, Petitioner argued that the witness was not dead and that none of the five criteria for witness unavailability under Rule 804 of the Texas Rules of Evidence had been met — or were even argued by the State. Therefore:

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[13] *See* 7th Court of Appeal Opinion at 2.

a. By law, the witness was alive and available to testify which was established in Appellant's Brief to the 7th Court of Appeals;

b. The Sixth Amendment and all of the United States Supreme Court cases on the subject, required him to testify at trial, under oath, and subject to cross-examination;

c. The State chose not to produce him at trial or any prior proceeding for cross-examination and instead relied solely upon vague and ambiguous testimonial hearsay for their case in chief; and

d. The trial court "overruled and denied" trial counsel's motion for a directed verdict that was made on the basis that the right to confrontation had been violated.

The 7th Court of Appeal's response to all of this was to claim it knew of no "blanket" rule that would require the State to produce the accuser in Petitioner's case and then the 7th Court stated:

> "Indeed, if the right to confront were to impose a blanket requirement that the victim testify as a condition to conviction in every case, as appellant may be suggesting, then the State could never obtain a conviction against one accused of murder; as the old adage says, 'dead men tell no tales.' So, we reject this aspect of what appellant may be arguing."

See 7th Court of Appeal Opinion at 3.

In order to make that statement, the 7th Court of appeals had to utterly and inexcusably ignore the plain language of the Sixth Amendment as well as the United States Supreme Court's rulings in at least ten cases spanning over 114 years of jurisprudence that were handed to them in Appellant's Brief. Additionally, the

7th Court had to completely ignore Petitioner's acknowledgment in his Brief that if a witness is dead or otherwise legally unavailable, then they do not have to testify.[14]

As discussed above, the United States Supreme Court has already held that "'it is simply a matter of English' that the Confrontation Clause confers at the very least the right to meet face to face all those who appear and give evidence at trial"[15] and that the right to do so is the "irreducible literal meaning"[16] of the plain language of the Confrontation Clause. Neither the plain language of the Sixth Amendment nor the Framer's intent nor over a century of United States Supreme Court jurisprudence indicates that admissible hearsay, which is exception to the rule and not the rule itself, was ever intended to be a substitution for live testimony subject to the "crucible of cross-examination" when a witness is alive and legally available to testify. Hearsay is allowed to be admitted if it falls into an exception to the rule against hearsay, but its admission into evidence is the gravy of our system. Live testimony subject to the "crucible of cross-examination"[17] is our Constitutional meat.

Petitioner had an irreducibly literal plain language right to confront his accuser who was alive and legally available to testify. The State of Texas and the Texas appellate courts acted in concert to deny Petitioner that right. Petitioner now

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[14] See Appellant's Brief at 19, 21, 25-27.

[15] Coy, 487 U.S. at 1016 quoting Green, 399 U. S. at 175.

[16] Coy, 487 U.S. at 1021.

[17] Crawford, 541 U.S. at 61.

asks this Court to right the wrong that Texas has done to him and to protect the rights of future defendants.

II. The issue merits this Court's attention.

A State court has decided an important question of federal Constitutional law in a way that goes against every ruling of this Court on the subject. That question is to whether criminal defendants still have the irreducibly literal right to confront the witnesses against them when those witnesses are alive and legally available to testify. Secondarily, testimonial hearsay may be an issue in the Court's decision and this Court has labored since Crawford to flesh out what it means for a statement to be "testimonial."

This Court should grant certiorari to resolve the question for two reasons.

First, more and more often States are using the distinction between testimonial and non-testimonial hearsay to determine whether or not to produce a legally available witness against the defendant to testify against a defendant at trial. This is based on an unConstitutional misunderstanding of the law. The plain language literal guarantee of the Sixth Amendment is that the accused "shall… be confronted with the witnesses against them." That is the Constitutional meat of our justice system. Admissible hearsay, whether testimonial or non-testimonial, is the gravy. Since Crawford, States no longer seem to understand that testimonial hearsay is hearsay that triggers Confrontation Clause issues. Non-testimonial hearsay is hearsay that does not trigger Confrontation Clause issues. Yet neither type of hearsay is a substitute for the literal Constitutional right to confront witness

against oneself. Hearsay may be offered at trial *in addition to* a legally available witness — not in his place. It is incomprehensible that anyone in America could be convicted solely on the basis of hearsay when an accuser — especially the only eye-witness to the offense — is alive and legally available to testify as required by the literal meaning of the plain language of the Sixth Amendment.

In Petitioner's case, the hearsay statements were testimonial, but whether they were or were not testimonial, the witness — who was by all accounts both alive and legally available — was required by the Sixth Amendment to confront the Petitioner at trial, under oath, and subject to cross-examination. In this case, with the proper findings by the trial court, and the appropriate set-up, testimony could have taken place via closed circuit television due to the accuser's age. The only reason the accuser was not called to testify was because the State was afraid he would not give the narrative they wanted.

Furthermore, the testimonial hearsay in this case was vague and ambiguous at best. It amounted to "he" did it or mom's "boyfriend" did it or "Randy" did it, but Petitioner and his ex-girlfriend had broken up weeks before the incident and his name is not "Randy."[18] Those who testified to the vague and ambiguous hearsay statements didn't even ask the accuser to clarify who he was speaking about. The officer who investigated the matter testified that he did not know who the "he"

[18] See Reporter's Record, Vol 2 at 134, 173, 186-187.

referred to in the statement that "he" did it.[19] As long as the victim was alive and legally available, the State had to produce him to testify at trial.

Second, this Court should grant certiorari so that justice may be done in this case and in those that follow it. Petitioner was denied a fundamental, literal, irreducible, and inviolable right based on the plain language of the Sixth Amendment and this Court's holdings for over 100 years. The 7th Court of Appeals of Texas refused to honor — or even acknowledge — our Constitutionally guaranteed right to confrontation. The Court of Criminal Appeals denied discretionary review. If this Court does not grant certiorari, then this Constitutional violation will not be rectified and Texas and other States will be emboldened to convict more defendants on hearsay, gossip, and innuendo alone and the appellate courts will continue to claim ignorance of Constitutionally guaranteed rights as an unjustifiable justification of unconstitutional convictions.

A grant of certiorari in this case would present an excellent opportunity to see that justice is done for Mr. Brannon and to hold once again that the Sixth Amendment's literal plain language right to confront the witnesses against you is inviolable for all Americans — even in Texas.

The right to confront his accuser will likely be a critical part of any merits resolution of the instant case.

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[19] See Reporter's Record, Vol 2 at 134.

III. Mr. Brannon's case is the right vehicle.

This case is an excellent vehicle to decide the constitutionality the confrontation clause. The issue was preserved in district court. S*ee* Reporter's Record, Vol 2 at 133-134, 172-173, and Vol 3 at 61.

Further, Petitioner argued in the district court,[20] and in the 7th Court of Appeals,[21] that the courts could rectify the constitutional error by acquitting the Petitioner. Both courts declined to do so. Then the highest court in Texas refused to hear the case. This means that the full range of remedies remains available in this case should the Court find a constitutional error.

This case presents a serious constitutional violation that merits this Court's review. This Court should grant certiorari and end the arbitrary and unjustified denial of one of the accused's most fundamental rights in Texas and throughout the nation: the right to confront the witnesses against oneself.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the 7th Court of Appeals of Texas.

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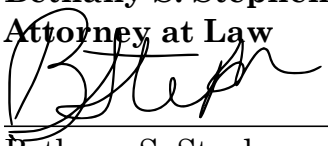
[20] See Reporter's Record, Vol 3 at 61. Trial counsel asked the court for a directed verdict and to acquit Mr. Brannon on the basis of the violation of his Sixth Amendment right to confront witnesses against himself because the State did not call the victim and only eyewitness to the incident to testify.

[21] See Petitioner's Brief at 58. Appellate counsel asked the court to overturn the verdict on the basis of the violation of his Sixth Amendment right to confront witnesses against himself because the State did not call the victim and only eyewitness to the incident to testify.

Respectfully submitted this 7th day of May, 2021.

Bethany S. Stephens
Attorney at Law



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