

No. 21-5807

FILED
SEP 17 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Christian Comacho — PETITIONER
(Your Name)

vs.

State of Nebraska — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Nebraska
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christian Comacho
(Your Name)

4201 S. 14th St.
(Address)

Lincoln, NE 68542
(City, State, Zip Code)

Incarcerated
(Phone Number)

QUESTION(S) PRESENTED

1. Did the district court err when it allowed testimony via two-way interactive video on foundational or "factual scenario" grounds over confrontation objections, due to witness' claim of COVID-19 concerns.
2. Whether an adult non-witness interpreter's testimony via two-way interactive video of defendant's alleged factual statements, adequately preserves the trier of fact's observation of witness' demeanor, specifically during cross-examination.

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:

RELATED CASES

State of Nebraska v. Christian Estrada-Comacho
309 Neb. 494, Nebraska Supreme Court Case No. S-20-619
Judgment June 18, 2021

State of Nebraska v. Christian Estrada-Comacho
Nebraska Court of Appeals Case No. A-20-617
Mandate February 17, 2021

State of Nebraska v. Christian Estrada-Comacho
Nebraska District Court Case No. CR-19-87
Judgment August 25, 2020

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Maryland v. Craig, 497 U.S. 836 (1990)	6
People v. Jemison, 952 N.W.2d 394 (2020)	6
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STATUTES AND RULES

Nebraska Constitution, Art. 1, §11
U.S. Constitution, Amend. 6

OTHER

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 _____ 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 is unpublished.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 _____ 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 _____ to the petition and is

reported at 309 Neb. 494; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ 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 _____.

[] 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 _____ (date) on _____ (date) in Application No. __A_____.

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 6/18/21. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied 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 _____ (date) on _____ (date) in Application No. __A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Nebraska Constitution, Article 1, §11
U.S. Constitution, Amendment 6

STATEMENT OF THE CASE

1. Information was filed on June 10, 2020, charging Comacho with conspiracy to distribute a controlled substance and robbery, arising out of alleged events on January 22, 2019.
2. At trial, testimony was given of complaining witness who had inquired of an agent regarding the purchase of \$5,000 of Methamphetamine. This agent contacted an intermediary who allegedly contacted Comacho. According to testimony by the intermediary, a meeting was arranged for the transaction. Complaining witness and the intermediary had never met prior to this transaction.
3. Complaining witness was directed to Comacho's place of employment on the night in question, where Comacho entered the vehicle. They then travelled to an apartment parking lot. After an amount of time, another vehicle approached. Complaining witness willingly agreed to provide Comacho with \$5,000. At no time was violence or force used, and Comacho exited the vehicle with the funds. After Comacho exited the vehicle, approximately three to four shots were fired. Complaining witness was shot, and at this time, having not identified where the shots came from, left the parking lot, making no attempt to collect either the money or the alleged Methamphetamine.
4. The State also called a detective unassigned to the case, Timothy Champion, to testify regarding the content of Spanish language telephone calls alleged to have been made by Comacho from the local county jail. On July 23, 2020, when asked to testify, Champion alleged to have tested positive for COVID-19, and the State requested that he testify via two-way interactive video. At no point was a positive COVID-19 test provided by Champion nor the State to the district court, hence, there was no collaboration of Champion's claims as to his unavailability.
5. In reaching its decision, the district court relied upon, and took judicial notice of, language promulgated by the Nebraska Supreme Court. The Nebraska Supreme Court noted ". . . that the courts are to remain open during this pandemic [because] courts are a necessary function of government."
6. In an attempt to preserve Comacho's right to confrontation, the Nebraska Supreme Court used precedent to apply a two-prong test regarding whether to allow interactive video testimony, and after applying said test, found that it was "necessary for public policy to protect the public" to allow Champion to testify via two-way interactive video.

7. Applying its test, the Nebraska Supreme Court found that because Champion would be "giving a factual scenario," the reliability of his testimony was assured, despite the jury's inability to reasonably judge Champion's demeanor and compsure on a two-dimensional screen as opposed to his three-dimensional presence.
8. Comacho objected to Champion's testimony on the grounds that Champion lacked the foundational experience to act as a translator; as he lacked any type of training, education, or certification that would be required of an in-court translator, per Nebraska law.
9. A jury found Comacho guilty of conspiring to distribute a controlled substance, to wit Methamphetamine, and aiding and abetting a robbery. The district court sentenced Comacho to 14 to 18 years for each charge, to run concurrent to a sentence imposed in a separate case. Comacho appealed his convictions and sentences to the Nebraska Court of Appeals. The Nebraska Supreme Court issued a Mandate to the Court of Appeals to take up the case directly due to the questions presented being "some issue[s] of importance."
10. On Mandate to the Nebraska Supreme Court, Comacho asserted that the district court erred by: 1) allowing Champion to testify via two-way video, and 2) overruling his objection to Champion's testimony based on lack of foundation for Champion to translate statements from Spanish to English.
11. The Nebraska Supreme Court found that the trial court did not err when it allowed Champion to testify via two-way interactive video over Comacho's confrontation and foundation objections.

REASONS FOR GRANTING THE PETITION

The onset of the COVID-19 pandemic has left the question of how to balance public health needs with the preservation of individual rights. This case, on appeal, was taken up by the Nebraska Supreme Court via Mandate, to decide what was considered to be an important question of law. The Nebraska Supreme Court held that foundational testimony via two-way interactive video was permissible in maintaining a defendant's Sixth Amendment Confrontation rights. However, other states have held differently.

In Michigan, a lab analyst laying foundational testimony via two-way interactive video during the course of a sexual assault trial was held to be in violation of the defendant's Sixth Amendment Confrontation right. See *People v. Jemison*, 952 N.W.2d 394 (2020).

In Montana, an officer who was laying foundational testimony via two-way interactive video regarding the extraction of cellphone data was held to have violated the defendant's Sixth Amendment Confrontation right. See *State v. Mercer*, 479 P.3d 967 (2021).

Both of these cases, *supra*, occurred during the COVID-19 health crisis, and are analogous to the case at hand; however, these cases were decided in the opposite manner to Comacho.

California has held the right to Confrontation under the Sixth Amendment to be so rigid that two years prior to the COVID-19 health crisis, when interpreting the holding under *Maryland v. Craid*, held that an underage child victim, who was seven months pregnant and experiencing pregnancy complications, should not have been allowed to testify via two-way interactive video, as allowing her to do so violated the defendant's Sixth Amendment Confrontation right.

There is currently a schism in the nation regarding the balancing of individual rights and public health concerns to such a degree that it requires the guiding hand of this Court to unify the conflicting decisions across various jurisdictions in these United States of America.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Christian Estrada Camacho

Date: 9-16-21