

No. _____

In the
Supreme Court of the United States

RYAN JAMES DEROO,
Petitioner,
v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of Illinois**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a retroactive modification of a state rule of evidence allowing certain medical records to be admitted as admissible hearsay which was previously barred by rule violates the Ex Post Facto Clause.

STATEMENT OF RELATED PROCEEDINGS

Supreme Court of Illinois, *People v. Ryan James Deroo*, 2022 IL 126120 (March 24, 2022).

Appellate Court of Illinois Third District, *People v. Ryan James Deroo*, 2020 Il. App (3d) 170163 (May 20, 2020).

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The petitioner, James Ryan Deroo, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois is published at *People v. Ryan James Deroo*; 2022 IL 126120. A copy of the opinion is attached as Appendix A. A copy of the order denying rehearing is attached as Appendix D.

JURISDICTION

On March 24, 2022, the Illinois Supreme Court issued an opinion affirming the judgment of the appellate court affirming Petitioner's conviction. (App. A) The Illinois Supreme Court denied rehearing on May 23, 2022. (App. D) This petition is being filed within 90 days of the order of the Illinois Supreme Court denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 9 of the United States Constitution state, in relevant part, that “no bill of Attainder or *ex post facto* Law shall be passed by Congress” (U.S. Const. art. I, § 9), while Article I, section 10, places similar limitation on state legislatures. (U.S. Const. art. I § 10).

STATEMENT OF THE CASE

As previously set forth in this petition, Article I, Section 9 of the United States Constitution state, in relevant part, that “ no bill of Attainder or *ex post facto* Law shall be passed by Congress” (U.S. Const. art. I, § 9), while Article I, section 10, places similar limitation on state legislatures. (U.S. Const. art. I § 10).

In its opinion in *Calder v. Bull*, 3 U.S. 386 (1798), this Court recognized four types of laws that cannot be applied retroactively consistent with these *ex post facto* clauses:

1st. Every law that makes an action done before passing the law, and which was innocent when done, criminal; and punishes such action. 2nd . Every law that aggravates a crime, makes it greater, makes it greater than it was, when committed. 3rd . Every law that changes the punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. *Calder v. Bull*; 3 U.S. 386 (1798)

In this case, the Illinois Supreme Court modified Illinois rule of evidence 803(6) in the body of its March 24, 2022 opinion to allow medical records to be admissible hearsay as a business records exception to the hearsay rule in a criminal case. Prior to the opinion of March 24, 2022, medical records were

excluded from the hearsay exception in criminal cases. As previously set forth, the Illinois Supreme Court amended Illinois rule of evidence 803(6) in its opinion. The Illinois Supreme Court retroactively applied the modification of Illinois Rule of Evidence 803(6) to apply to Defendant for an act which occurred years prior to the modification. The Illinois Supreme Court went on to hold that the modification of a rule of evidence does not raise “*ex post facto* concerns.”

Trial

At trial, Defendant, Ryan James Deroo (“Deroo”) was charged with one count of driving under the influence of alcohol, one count of aggravated driving with a blood alcohol concentration of 0.08 or greater and one count of aggravated driving while license revoked .

The evidence presented by the State at Deroo’s jury trial set forth that Deroo was operating a motor vehicle in Rock Island County on March 13, 2016 at about 6 or 7 p.m. The evidence at trial was that Deroo, while operating a motor vehicle, lost control of the vehicle, went off the road, flipped several times and crashed. An on coming motorist, Carrie Olson, saw the accident occur. Paramedics arrived on the scene. Deroo suffered facial fracture and cuts to his face. He was taken to the emergency room at the hospital. The blood results showed the Deroo’s blood level was elevated and over the legal limit.

Furthermore, the evidence presented at trial established that a Jennifer Wilkinson, treated Deroo at the emergency room hospital. She testified that Deroo’s

blood was drawn as part of his emergency room treatment. Wilkinson did not remember whether she had drawn the blood or if a phlebotomist from the lab had come into the emergency room to do so. Wilkinson described and testified that she saw Deroo's ethanol result from the blood test come through a computer.

Dr. Douglas Gaither, testified that he treated the Defendant in the hospital emergency room after the crash. He was established as an expert in emergency medicine. In an offer of proof outside of the presence of the jury, Dr. Gaither testified that there was no chain of custody for the blood test result. He reasoned that due to the need to get blood results rapidly so that treatment decisions could be made. At the offer of proof, Dr. Gaither testified that the blood alcohol result was complete and a reliable result upon which he could, and did rely upon.

When Dr. Gaither came back to testify before the jury, Dr. Gaither opined that Deroo's blood was drawn as part of Deroo's emergency medical treatment pursuant to hospital protocol. According to Dr. Gaither, after Deroo's blood was drawn, Deroo's blood was tested by the lab at the hospital to determine blood alcohol serum level. That the lab was the same one the hospital always used and, to Dr. Gaither's knowledge, was certified to conduct blood analysis. The results of the blood analysis came back over the computer screen under Deroo's name.

The record will show that Deroo's emergency room blood draw was admitted into evidence and published to the jury.

Deroo did testify in his behalf at trial.

The jury found Deroo guilty on all counts. Deroo filed a motion for judgment notwithstanding the verdict or for new trial; which the trial court denied. Following a sentencing hearing, Deroo was sentenced to concurrent terms of nine years in prison for the offense of aggravated DUI and three years in prison for the offense of aggravated Driving While License Revoked.

Appeal

On appeal, Deroo argued, among other things, that the trial court erred in admitting his hospital blood tests into evidence. Deroo argued that the trial court misinterpreted the relevant Illinois Supreme Court Rule of Evidence when the blood test results were admitted. The Appellate Court of Illinois affirmed Deroo's conviction. *People v. Ryan James Deroo*, 2020 IL App (3d) 170163. One justice did dissent in the opinion. He wrote that he would reverse the Deroo's convictions because the trial court erred in admitting the Deroo's hospital blood tests into evidence. *Id.*; ¶ 49 (Holdbridge, J.; dissenting). The dissent opined the decision of the trial court to admit the blood test depends upon the proper interpretation of Illinois Rule of Evidence 803(6) (eff. April 26, 2012). At the time of Deroo's trial, Illinois Rule of Evidence 803(6) excluded medical records as business records exception to the hearsay rule in criminal cases. Therefore, the trial court's decision to admit hearsay medical records in a criminal case was in error since such evidence was specifically excluded by Illinois Rule of Evidence 803(6).

The Illinois Supreme Court granted Deroo's petition for leave to appeal. The Illinois Supreme Court affirmed the judgment of the appellate court for reasons not set forth in the record. The Illinois Supreme Court in its opinion immediately amended Illinois Rule 803(6) by removing the medical exclusion for criminal cases. The Illinois Supreme Court ruled that the Amended Rule of Evidence Rule 803(6) was applicable to all pending cases, including Deroo's case. As previously set forth, The Illinois Supreme Court ruled that the newly amended Rule 803(6) did not violate the Ex Post Facto Clause of the United States and Illinois Constitutions.

Deroo's petition for rehearing was denied.

REASON FOR GRANTING CERTIORARI

Article I, Section 9 of the United States Constitution state, in relevant part, that "no bill of Attainder or ex post facto Law shall be passed by Congress" (U.S. Const. art. I, § 9), while Article I, section 10, places a similar limitation on state legislatures. (U.S. Const. art. I, § 10). The United States Supreme Court recognizes four types of laws that cannot be applied retroactively consistent with the ex post facto clause of the United States Constitution. First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourth, every law that alters the legal rules of evidence and

receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. *Calder v. Bull*, 3 U.S. 386 (1798). The Illinois Supreme Court's holding that its ruling does not raise Ex Post Facto Clause is incorrect because it directly contradicts the fourth prong in *Calder v. Bull*. Both federal and state courts are divided over whether an amendment of an evidentiary rule violates the Ex Post Facto Clause. Given the long standing definition of Ex Post Facto as set forth in *Calder v. Bull*, the resolution of whether the modification of a rule of evidence is Ex Post Facto, is of critical importance to the interests of justice. For these reasons, this Court should grant certiorari in this case.

I. The Illinois Supreme Court's conclusion as set forth in its opinion which amended an existing rule of evidence to allow into evidence certain medical records as a business rule exception to the hearsay rule which was previously inadmissible hearsay is incorrect and undermines this Court's holdings in *Calder v. Bull* which defines what qualifies as *Ex Post Facto*.

This Court has held that under Article I, Section 9 of the United States Constitution states, in relevant part, that “no bill of Attainder or ex post facto Law shall be passed by Congress” (U.S. Const. art. I, § 9), while Article I, section 10, places a similar limitation on state legislatures. (U.S. Const. art. I, § 10). *Calder v. Bull*, 3 U.S. 386 (1978).

As previously set forth, In its opinion in *Bull*, the United States Supreme Court recognized four types of laws that cannot be applied retroactively consistent with the *ex post facto* clause of the United States Constitution. First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. *Id.* at 390. Second, every law that aggravates a crime, or makes it greater than it was when committed. *Id.* Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *Id.* And fourth, every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. *Id.*

It is clear from the principles of the *ex post facto* clause as set forth in *Calder v. Bull*, the Illinois Supreme Court's opinion which retroactively modified Illinois Rule of Evidence 803(6) violates the fourth prong of *Calder v. Bull*. As this Court explained in *Calder v. Bull*, the fourth prong of the opinion specifically sets forth "every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender" violates *ex post facto*. *Id.*

The Illinois Supreme Court's decision was based upon its ability to amend Illinois Rule of Evidence 803(6) in its opinion. The Illinois Supreme Court can modify this rule, *instanter*. See Illinois Supreme Court Rule 3. However, the Illinois Supreme Court's decision

to amend the rule and to retroactively make the rule applicable to all pending cases, including Deroo's, conflicts with this Court's opinion in *Calder v. Bull* that altering the legal rules of evidence violates *ex post facto*. *Id.*

As previously set forth, the Illinois Supreme Court's retroactive modification of Illinois Rule of Evidence 803(6) violated the fourth prong of *Calder*. Clearly, the Illinois Supreme Court's opinion that modified Rule 803(6) in order to retroactively remove the medical records exclusion for criminal cases regarding the business records exception to the hearsay rule. This act by the Illinois Supreme Court enabled that Court to affirm the Illinois Appellate Court's opinion in permitting Deroo's conviction for aggravated driving under the influence to stand, in a way that the intermediate reviewing court could not have accomplished. The retroactive change to Illinois Rule of Evidence 803(6) removed the conflict of provisions that the appellate court denied even existed. It is undisputed, therefore, that this Court's amendment to Illinois Rule 803(6) permitted the prosecutor to obtain Deroo's conviction, and the initial reviewing court to affirm it, pursuant to a rule which did not exist at the time of Deroo's crime, his trial, or the first appeal in this case.

In its opinion, the Illinois Supreme Court, citing to the opinion in *Carmell v. Texas*, 529 U.S. 513 (2000), declared that the amendment to Rule 803(6), "does not raise any *ex post facto* concerns." *Deroo*, 2022 IL 126120, ¶¶ 46. In counter-argument, Deroo takes issue with the Illinois Supreme Court's pronouncement that

the retroactive application of the amended Rule is “evenhanded in the sense that it may benefit either the State or the defendant in any given case.” (*Deroo*, ¶ 47 (citing *Carmell v. Texas*, 529 U.S. 513, 533 n.23 (2000))). Deroo counters that the Illinois Supreme Court’s retroactive amendment to Rule 803(6) is not even handed and at no time will be applied to the benefit of accused defendants. Defendants, including Deroo, are simply not going to face a charge of driving with more than the “legal limit” of a substance in their blood where the tests performed by medical-care providers who treated Deroo determined that the accused’s “BAC” (blood alcohol content) was under that limit. Without a doubt, prior to the Illinois Supreme Court’s decision to change the text of Rule 803(6) in the text of its March 24, 2022 opinion, to allow medical records to be admitted into evidence as a business records exception to the hearsay rule in a criminal case, a prosecutor constrained by the former version of the Rule could not present at any defendant’s trial, including Deroo, an emergency room blood draw as a business records exception to the hearsay rule, notwithstanding the legislature’s passage of 625 ILCS 5/11-501.4(a) by the Illinois General Assembly. At no time, can the Illinois Supreme Court’s retroactive amendment to 803(6), which now gives a party to a criminal case the ability to have a medical record admitted as a hearsay document, benefit someone in the same circumstance as Mr. Deroo. Certainly, the amendment was not “even handed” when viewed by a prosecution entity versus someone like Mr. Deroo. The retroactive amendment as applied to this case allowed the entry of certain hearsay evidence which was otherwise barred by the Illinois Rules of Evidence

which was in effect at the time of Deroo's arrest and subsequent trial.

In support of his argument that the Illinois Supreme Court's decision violates Ex Post Facto as set forth in *Calder v. Bull*, Deroo points to the Oregon Supreme Court decision in the matter of *State of Oregon v. Steven Glen Fugate*, 332 Or. 195 (2001) . In *Fugate*, Defendant Fugate contended that Oregon rule SB 936 violated the constitutional restrictions against *ex post facto* laws, set out in Article I, Section 21, of the Oregon Constitution, and in Article I, Section 10 of the United States Constitution. *State v. Fugate*, 332 Or. at 210.

The Oregon Supreme Court ruled that the *ex post facto* clause of the Oregon Constitution prohibits the retroactive application of laws that alters the rules of evidence to make a conviction more likely. Steven Fugate's conviction was reversed by the Oregon Supreme Court because the rule of evidence changes that were at issue in his case were found to have violated Oregon's *ex post facto* clause. Specifically, the Oregon Supreme Court opined that, "We cannot conceive of a circumstance in which a defendant would be benefitted by the admission of evidence that would otherwise be suppressed. Section 1 thus operates only in the favor of the prosecution. *State v. Fugate*, 332 Or. at 214-215.

Deroo concedes in this petition that federal courts and state courts are deeply divided over the question of interpreting fact patterns in reference to the fourth prong of *Calder v. Bull*. As previously set forth, the fourth prong defines how the alteration of a rule of

evidence can violate the *ex post facto* clause of the United States Constitution. Deroo calls to this Court's attention a decision out of the Court of Appeals of the State of Alaska known as *Kowalski v. State*, 426 P.3d 1148 (Alaska Ct. App. 2018). When discussing Defendant Kowalski's position that application of modified Alaska Rule of Evidence 404(b)(4) violated the *ex post facto* clause, the Alaska Appeals Court opined, "In support of this, Kowalski cites two Oregon cases in which the Oregon Supreme Court held that Oregon's *ex post facto* clause prohibits the retroactive application of evidentiary rule changes argument." The Alaska Court went on to say that the "Oregon Supreme Court's *ex post facto* analysis appears to be an outlier in State Court decisions." *Kowalski* at 1153. (*Kowalski* citing *State v. Fugate*, 332 Or. 195 (2001) and *State v. Guzek*, 336 Or. 424 (2004)).

As set forth, the Alaska appellate court in *Kowalski* rejected the same fourth prong in *Calder v. Bull* in determining whether an alteration of a rule of evidence was *ex post facto*. Significantly, as previously set forth, the cases out of Oregon, which stated the Oregon's altering of a rule of evidence did violate the *ex post facto* clause; while the case out of Alaska, which stated that Alaska's altering the rule of evidence did not violate the *ex post facto* clause. Both cases cite and use the opinion in *Carmell v. Texas*, 529 U.S. 513, thus creating a conflict. Furthermore, the Illinois Supreme Court in this cause also applied *Carmell v. Texas* when that court ruled the retroactive alteration of Illinois Rule of Evidence 803(6) did not violate the *ex post facto* clause. *Deroo*, 2022 IL 126120, ¶¶ 46, 47.

In summation, the practice condoned by the Illinois Supreme Court in this case, which retroactively altered Illinois Rule of Evidence 803(6) to allow medical records into evidence as a business records exception to the hearsay rule, undermined the Court's holdings in *Calder v. Bull* and *Carmell v. Texas* for reasons previously set forth in this petition. To retroactively allow into evidence certain medical records to convict Defendant Deroo of the offense of aggravated driving under the influence is inconsistent with this Court's holdings in *Calder v. Bull* and *Carmell v. Texas*.

Certainly, for reasons previously set forth, the Illinois, the Illinois Supreme Court's finding that the retroactive alteration of Illinois Rule of Evidence 803(6) did not evenly treat the Defendant Deroo and the prosecution. In addition, the federal and state courts are deeply divided over this question as to interpretation of the fourth prong in *Calder v. Bull*. Because this issue is of critical importance for the administration of criminal justice, this Court should use this case to resolve the conflict among the courts.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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