

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

—◆—  
PETER MARK LEE,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The Texas Fourth Court Of Appeals  
At San Antonio**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
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**QUESTION PRESENTED**

Whether the Texas Appellate Courts' Approval of the Admission of a Police Dispatcher Audio Recording of a "Non-emergency" Telephone Call, Where the Named Complainant Refused to Testify at Trial Against the Petitioner, Violated Petitioner's Sixth and Fourteenth Amendment Rights to Secure the Confrontation of Witnesses Against Him, under the Mandates of *Davis v. Washington & Hammon v. Indiana*, 547 U.S. 813 (2006) and *Michigan v. Bryant*, 562 U.S. 344 (2011).

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## OPINIONS BELOW

The opinion from which review is sought was delivered by Texas' Fourth Court of Appeals at San Antonio in *Lee v. State*, 04-16-00368-CR (Tex.App. – San Antonio; August 2, 2017).



## STATEMENT REGARDING JURISDICTION

Discretionary review of the Court of Appeals' decision was timely requested on November 20, 2017. The petition was refused on February 2, 2018. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1257 (a), as the opinion of the Court of Appeals is the final judgment rendered by the state courts of Texas.



## STATUTORY PROVISIONS AT ISSUE

This case involves solely issues of constitutional dimension.



## CONSTITUTIONAL PROVISIONS AT ISSUE

The following provisions of the Constitution of the United States are involved in this case:

The **Sixth Amendment** provides:

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 cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The **Fourteenth Amendment** provides, in relevant part:

(Section 1) 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

The question in this case is what constitutes an “emergency” call within the meaning of *Davis v. Washington & Hammon v. Indiana*, 547 U.S. 813 (2006) and *Michigan v. Bryant*, 562 U.S. 344 (2011), and how that applies to an accused’s Sixth and Fourteenth Amendment rights to secure the confrontation of witnesses.



## **PROCEDURAL HISTORY**

Petitioner was charged by information with the offense of assault with bodily injury, a Class “A” misdemeanor under Texas law. He was convicted in said cause and was sentenced to one (1) year in jail, probated for two (2) years.



## **DISCUSSION REGARDING TIMELINESS**

The Court of Criminal Appeals refused discretionary review on February 7, 2018. Pursuant to section 1 of Rule 13, “A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.” Consequently, this petition is timely if filed on or before May 8, 2018.



## **ARGUMENTS IN FAVOR OF ISSUING A WRIT OF CERTIORARI**

### **A. Issues Restated**

#### **Question Presented**

Whether the Texas Appellate Courts’ Approval of the Admission of a Police Dispatcher Audio Recording of a “Non-emergency” Telephone Call, Where the Named Complainant Refused to Testify at Trial Against the Petitioner,

Violated Petitioner's Sixth and Fourteenth Amendment Rights to Secure the Confrontation of Witnesses Against Him, under the Mandates of *Davis v. Washington & Hammon v. Indiana*, 547 U.S. 813 (2006) and *Michigan v. Bryant*, 562 U.S. 344 (2011).

## **B. Relevant Facts**

Petitioner was charged with the offense of assault with bodily injury, dealing with an alleged domestic assault of his wife, occurring on October 25, 2014.

Petitioner's wife refused to testify at trial, ignoring a subpoena from the state, and informing the prosecutors that she would not testify against the Petitioner. The state proceeded to trial anyway.

The State's entire case consisted of the admission of a telephone call recorded by the Boerne Police Department, made by the complainant on the date in question, the testimony of two police officers and a paramedic who were at the scene, identifying photographs of the complainant purportedly showing alleged injuries received during an altercation with Petitioner.

After the State rested its case, Petitioner testified about his relationship with his wife, indicating that they were both English citizens, and that his wife had a background in law enforcement. Petitioner related, that on the evening in question, they had gone to a party where alcoholic beverages were consumed, and that complainant became intoxicated, and was "beside herself, completely irrational, illogical, [and] verging on incoherent," and aggressively combative and assaultive.

Petitioner related that he attempted to defend himself against his wife's aggressive behavior, and then finally went to bed. Later in the evening, police officers arrived at the scene, and eventually arrested Petitioner, resulting in this prosecution.

### **C. Disposition in the Court Below**

At the Court of Appeals, Petitioner claimed that the trial court erred by admitting State's exhibits 1 and 14, in violation of his Sixth Amendment right to confrontation.

### **D. Arguments & Authorities**

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court explained that "witnesses," under the Confrontation Clause, are those "who bear testimony," and defined "testimony," as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. The Sixth Amendment, the Court concluded, prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54.

In *Davis v. Washington & Hammon v. Indiana*, 547 U.S. 813 (2006), the Court dealt with statements given to law enforcement officers by the victims of domestic abuse. The complainant in the *Davis* case made statements to a 911 emergency operator during and shortly

after her boyfriend's violent attack. In the *Hammon* case, after being isolated from her abusive husband, the complainant made statements to police that were memorialized in a "battery affidavit." *Davis*, 547 U.S. at 820.

The Court held that the statements in the *Hammon* case were testimonial, while the statements in the *Davis* case were not. Announcing what has come to be known as the "primary purpose" test, the Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such 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 822.

In *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court further expounded on the primary purpose test. The Court reiterated its view in *Davis* that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." *Bryant*, 562 U.S. at 358.

*Crawford, Davis & Hammon*, and *Bryant*, all concern statements made to law enforcement personnel. An examination of those cases demonstrates that the “primary purpose” test is resolved by examining the intent of the declarant, not that of the law enforcement personnel.

During the second day of trial proceedings in the instant case, when lead counsel for the State advised the trial court that the “911 dispatcher”<sup>1</sup> would be the first witness, defense counsel set out his objections to the recording, arguing that the statement constituted a hearsay statement of Petitioner’s wife, and violated Petitioner’s right to confrontation (RR Vol. 2, P. 17) under *Crawford*. Counsel for the State then claimed the recording showed an emergency, despite her actual recognition the recording made clear that the alleged perpetrator, the caller’s husband, had gone to bed, and the caller could simply walk out the front door, if necessary (RR Vol. 2, P. 18).

The Court of Appeals ultimately found that the “primary” purpose of the phone call was to obtain emergency help. Thus, the Court of Appeals found that the admission of the recording was proper. *Lee*, slip op. at 7.

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<sup>1</sup> The use of the phrase “911 dispatcher” by the State was, intentional or not, a misstatement. The person who answered the phone call did not purport to answer a “911” phone call and did not claim to be a 911 dispatcher. State’s Exhibit 1 (0:06). Any assumption that this was a “911” call would be unsupported.

It was made very clear from the recording, which begins with the operator saying, “Boerne Police Department Communications,” that the phone call did not concern an on-going event, despite the State’s continual misrepresentations of that call as a “911” call. Both State’s Exhibit 1, the complete recording, and State’s Exhibit 14, the redacted version which was played for the jury, are included in the attached compact disc. Additionally, Petitioner has had State’s Exhibit 14 transcribed by a certified court reporter. That transcription is Exhibit “C” in the Appendix.

Listening to either State’s Exhibit 1 or State’s Exhibit 14 will demonstrate to the listener that there is absolutely no urgency expressed in the caller’s voice, nor any urgency expressed in the words she was actually speaking. A fair line by line summary of Petitioner’s Exhibit “C” attached hereto, which was admitted before the jury, is as follows:

1. Page 2, Lines 5-13: The complainant makes clear that she wanted to report a “*domestic*,” that had already happened, “*about an hour ago*.”<sup>2</sup>

2. Page 2, Lines 17-21: After the operator asks, the complainant gives the address, and indicates that her husband was “*involved*.”

3. Page 2, Line 22: The operator asks if husband is still at residence, and the complainant responds

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<sup>2</sup> See State’s Exhibit 1 (0:06).

“*yeah*,” and then starts to explain an act that the husband had previously committed against her.

4. Page 3, Line 4: The complainant advised that she had already called her sister first, before the police were called.

5. Page 3, Lines 4-8: The complainant explains part of her telephone conversation with her sister.

6. Page 3, Lines 9-10: The operator asks where the husband is at that moment.

7. Page 3, Lines 11-15: The complainant advises that her husband has gone to bed.

8. Page 3, Lines 16-21: The operator asks about injuries, and the complainant explained both she and Petitioner had sustained injuries.

9. Page 3, Lines 22-25, and Page 4, Lines 1-3: The operator asks about children in house, and complainant advises that children are present in the house, but asleep.

10. Page 4, Lines 4-7: The operator finally asks and receives the complainant’s name.

11. Page 4, Lines 8-18: The operator asks about availability of weapons, and the complainant responds that there aren’t any weapons in the home, volunteering that they are not part of the “*gun thing*,” as they are not “*Texans . . . nor even American*.”

12. Page 4, Lines 19-24: The operator asks about use of alcohol, and the complainant indicates that

there had been some consumption “*earlier in the evening.*”

13. Page 4, Line 25 and Page 5, lines 1-8: The complainant starts again describing the assault and her injuries, but then responds to the operator’s question about whether her hair had been pulled “*off*” in the negative (Lines 5-7).

14. Page 5, Lines 9-15: The operator asks whether the complainant wants medical attention. The complainant answers initially in the *negative*, and then states she doesn’t know whether she wants medical attention.

15. Page 5, Lines 16-21: The operator asks the complainant if she wants to be looked at “*right now.*” The complainant responds that no ambulance is required because it is “*not urgent*” and “I’m okay.”

16. Page 5, Lines 24-25 and Page 6, Lines 1-2: The operator asks the complainant if she’d rather wait for an officer to determine whether an ambulance was called, to which complainant responds in the affirmative.

Petitioner’s wife was not calling about “events as they were actually happening,” as in *Davis*, but was “describing past events,” as in *Crawford* – events that, in the words utilized by Petitioner’s wife, had “already happened.”<sup>3</sup> Petitioner’s wife advised the operator that

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<sup>3</sup> See State’s Exhibit 1 (0:20).

she was calling about an incident which occurred at least an hour previously.<sup>4</sup>

The “primary purpose” of the telephone call in the case before the Court was not to enable police assistance to meet an ongoing emergency. Petitioner’s wife stated, in fact, that she had taken the time to call her sister,<sup>5</sup> and that the situation was not urgent.<sup>6</sup> Additionally, she had to be convinced to have an officer sent to the residence to determine if she needed medical care.<sup>7</sup> Most importantly, Petitioner’s wife categorized the situation as “*not urgent*” (see Exhibit “C” attached hereto, Page 25, Line 20).

Moreover, the questions being asked by the operator heard in State’s Exhibits 1 and 14 certainly utilized the type of “structured police questioning” which occurred in *Crawford*, 541 U.S. at 53, fn. 4. For example, the operator asked several questions designed to determine what had already happened:

- Who else was involved;<sup>8</sup>
- The facts of the incident being reported;<sup>9</sup>
- What injuries Appellant had caused;<sup>10</sup>

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<sup>4</sup> See State’s Exhibit 1 (0:25).

<sup>5</sup> See State’s Exhibit 1 (1:05).

<sup>6</sup> See State’s Exhibit 1 (3:20).

<sup>7</sup> See State’s Exhibit 1 (3:29).

<sup>8</sup> See State’s Exhibit 1 (0:41).

<sup>9</sup> See State’s Exhibit 1 (0:59; 2:44).

<sup>10</sup> See State’s Exhibit 1 (1:30).

- Whether the parties had been drinking earlier;<sup>11</sup> and
- Why the altercation started.<sup>12</sup>

The issue in the instant case is made even more important because, as is clear from the testimony at trial, Petitioner, his wife, and their two children, are all citizens of the United Kingdom, foreign nationals. As such, all will be subject to exclusion or deportation if Petitioner's conviction stands.

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## CONCLUSION

Nothing in the record of the Complainant's call to the Boerne police indicated any urgency on her part, as all the events had already happened and were not urgent. All the relevant questions were specifically designed to ascertain what happened, and not how to help the caller, other than to schedule a further police inquiry. Consequently, the statements made by Complainant in State's Exhibits 1 and 14 were testimonial, and admission of the recording violated Petitioner's Sixth and Fourteenth Amendment rights to secure the confrontation of witnesses against him, under the mandates of *Davis*, *Hammon*, and *Bryant*.

The decision of the Court of Appeals, below, clearly indicates that Texas courts are continuing to refuse to

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<sup>11</sup> See State's Exhibit 1 (2:19).

<sup>12</sup> See State's Exhibit 1 (2:27).

follow the mandates of this Court. This situation requires summary review in this case.

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**PRAYER FOR RELIEF**

The above premises considered, Peter Mark Lee, Petitioner, respectfully prays that this Honorable Court will grant his Petition for Writ of Certiorari to the Fourth Court of Criminal Appeals of Texas, vacate and remand the issue presented to the Court of Appeals for proper consideration of the issue regarding admission of the recorded conversation in violation of Petitioner's right to confrontation.

Respectfully submitted,

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