No. ________

In The
Supreme Court of the United States

HAYDEN HUSE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

ALLISON CLAYTON
Counsel of Record
THE LAW OFFICE OF
B. ALLISON CLAYTON
P.O. Box 64752
Lubbock, Texas 79464
806-773-6889
888-688-4515 (facsimile)
Allison@AllisonClaytonLaw.com

CHUCK LANEHART
CHAPPELL, LANEHART & STANGL, P.C.
1217 Avenue K
Lubbock, Texas 79401
806-765-7370
806-765-8150 (facsimile)
ChuckLanehart@LubbockCriminalDefense.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Does HIPAA, along with other state and federal regulations, provide the basis for an individual's reasonable expectation of privacy in his medical records sufficient to invoke Fourth Amendment protections?

Does HIPAA preempt Texas's law that a prosecutor may independently obtain the medical records of a person suspected of committing a crime because there is no reasonable expectation of privacy in those records?

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Petitioner Hayden Huse respectfully petitions for a Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals (Pet. App. (App.) 1a) can be found at 419 S.W.3d 833 (Tex. Crim. App. 2016). The opinion of the Court of Criminal Appeals denying rehearing is unreported. *Id*. 61a. The opinion of the state intermediate court of appeals is not published but can be found at 2014 WL 931265. *Id*. 39a.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on April 13, 2016. The court denied rehearing and issued its mandate in the case on June 15, 2016. On September 12, 2016, the Court granted a thirty-day extension of the filing deadline for the instant petition.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution is implicated in this case. It provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Two provisions of the Health Insurance Portability and Accountability Act (HIPAA) are also implicated in this case. The first provision deals with permitted disclosure of medical records. It establishes,

> A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.
>
> (1) Permitted disclosures: Pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:
>
> ...
>
> (ii) In compliance with and as limited by the relevant requirements of:
>
> (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
>
> (B) A grand jury subpoena; or
>
> (C) An administrative request, including an administrative subpoena or summons, a civil

> or an authorized investigative demand, or similar process authorized under law, provided that:
>
> (1) The information sought is relevant and material to a legitimate law enforcement inquiry;
>
> (2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
>
> (3) De-identified information could not reasonably be used.

45 C.F.R. § 164.512(f).

The second provision of HIPAA implicated in this case is the statute's Preemption Clause and the statute containing definitions of words used in the Preemption Clause. The relevant portion of the Preemption Clause itself states, "[a] standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law." *Id.* § 160.203. The definitions statute clarifies,

> Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:
>
> (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements; or

> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104-191, or sections 13400-13424 of Public Law 111-5, as applicable.
>
> ...
>
> State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.

Id. § 160.202.

STATEMENT OF THE CASE

A. Factual History

As he was driving alone through the country late one night, Mr. Huse lost control of his vehicle and went off the road into a ditch. He was taken to the hospital for treatment. Approximately three hours after the accident, a state trooper met with Mr. Huse at the hospital. Mr. Huse's injuries made field sobriety testing impossible. The trooper, however, smelled alcohol on Mr. Huse's breath and thought his eyes looked red and watery. In response to questioning, Mr. Huse told the officer he had consumed six to seven beers over the course of three hours earlier in the evening. He finished his last beer approximately two-and-a-half hours before the accident.

Given his observations and Mr. Huse's statements, the trooper thought Mr. Huse was perhaps intoxicated at the time of the wreck. The trooper asked Mr. Huse for a sample of his blood. Mr. Huse refused. He additionally invoked his right to counsel. Mr. Huse's refusal and invocation of his constitutional rights, however, was of no practical consequence. As part of his medical treatment, the hospital had already drawn Mr. Huse's blood. Finding potentially inculpatory evidence of Mr. Huse's blood alcohol level was simply a matter of obtaining his medical records.

The trooper asked a prosecutor for a grand jury subpoena of the medical records. The prosecutor did not present the case to the grand jury for a subpoena. He did not present the case to a magistrate to obtain a warrant. In fact, the prosecutor did not do anything on the case until March 30, 2010, forty-five days after the February 13, 2010, accident. At that time, the prosecutor created a "Grand Jury Subpoena." The prosecutor himself then signed the subpoena as the "foreman."[1] At the time, no actual grand jury was investigating the case. The grand jury was not even aware any subpoena had issued. Mr. Huse was likewise never notified the State was requesting his medical records.

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[1] In Texas, either "[t]he attorney representing the state, or the [grand jury] foreman" may "issue a summons." Tex. Code Crim. Proc. Ann. art. 20.10. The Court of Criminal Appeals has interpreted this provision to mean a prosecutor has the power to unilaterally issue a "grand jury" subpoena without any involvement whatsoever from the grand jury.

Furthermore, the subpoena did not simply compel production of the blood alcohol tests done on the night of the accident. Instead, it ordered production of "[a]ll true and accurate copies of all medical records, emergency room records, reports, lab reports, lab work including blood alcohol lab work, and doctor notes pertaining to Hayden Huse ... for date of service of February 13, 2010 and any dates thereafter pertaining to original date." The subpoena was also not returnable to the grand jury. Rather, it directed the hospital to deliver Mr. Huse's medical records directly to the district attorney. The hospital complied with the subpoena, delivering a complete copy of Mr. Huse's medical records. Part of the medical records delivered to the prosecutor indicated Mr. Huse's blood alcohol level exceeded the legal limit.

B. Procedural History

On March 31, 2010, Mr. Huse was charged by Complaint and Information with driving while intoxicated (DWI). Mr. Huse filed a motion to suppress. The prosecutor subsequently dismissed the March 31, 2010 Complaint. Approximately one week later, the prosecutor – for the first time – presented the case to a grand jury. The grand jury issued another subpoena identical to the first. The hospital again complied, turning over records identical to those originally given to the prosecutor. Mr. Huse was re-charged with DWI, and he again urged a motion to suppress.

The trial court granted Mr. Huse's motion to suppress. The intermediate appellate court reversed the trial court's ruling. The Texas Court of Criminal Appeals affirmed the appellate court. In doing so the court below made two relevant rulings. First, it held Mr. Huse did not have a reasonable expectation of privacy in those parts of his medical records containing the results of blood alcohol testing. Second, the court below ruled HIPAA was not violated by the prosecutor's actions, and HIPAA's preemption provision did not otherwise require exclusion of the records.

REASONS FOR GRANTING THE PETITION

A. State and Federal Courts Are Deeply Divided on the Issue

The decision of the Texas court has deepened the divide among state courts of last resort and federal courts of appeals on a fundamental Fourth Amendment issue. At least three state courts of last resort and four federal circuit courts of appeals hold the warrantless intrusion into the medical records of a person suspected of a crime violates the Fourth Amendment. On the other hand, five state courts and one federal circuit court reach the exact opposite conclusion. *See* Justice Brennan, *Some thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983) (indicating issues where more than two courts of appeals conflict are worthy of the Court's attention).

1. Jurisdictions where there is a reasonable expectation of privacy in the potentially inculpatory medical records of a person suspected of committing a crime

The decision of the Texas court conflicts with caselaw from the high courts of at least Louisiana, Pennsylvania, and Ohio, along with the Second, Fourth, Seventh, and Tenth Circuit Courts of Appeals. The Ninth Circuit has issued what appears to be conflicting caselaw on the issue.

a. State caselaw

Similar to the case at bar, in a Louisiana case, law enforcement used a subpoena duces tecum to obtain the medical records of a defendant suspected of "doctor shopping." *State v. Skinner*, 10 So.3d 1212, 1213 (La. 2009). The Supreme Court of Louisiana found "the Fourth Amendment and La. Const, art. I, § 5 require a search warrant before a search of prescription and medical records for criminal investigative purposes is permitted." *Id.* at 1218.

> Considering the federal jurisprudence and Louisiana's constitutional requirement of a heightened privacy interest for its citizens, we find that the right to privacy in one's medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable. Therefore, absent the narrowly drawn exceptions permitting warrantless searches, we hold a warrant is required to

> conduct an investigatory search of medical and/or prescription records.

Id.

In Pennsylvania, a police officer obtained, without a warrant, the results of a hospital's blood alcohol tests of the defendant. In a five-to-two split, the Supreme Court of Pennsylvania held the release of the defendant's medical records violated a provision of the Pennsylvania Constitution that very closely tracks the Fourth Amendment of the U.S. Constitution.[2] *Pennsylvania v. Shaw*, 564 Pa. 617, 624, 770 A.2d 295, 299 (2001). The concurrence in that case indicated his belief that such a narrow holding was not necessary and that in fact the practice was unconstitutional under both state and federal constitutional provisions. *Id.*, 564 Pa. at 625, 770 A.2d at 300 (Nigro, J., concurring).[3]

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[2] The relevant provision of the Pennsylvania Constitution reads, "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures...." PA. CONST. art. I, § 8.

[3] While *Shaw* is the oldest case falling on this side of the argument, the Supreme Court of Montana was actually the first to find a reasonable expectation of privacy in the medical records of criminal suspects. In 1997, it held "if the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records. *State v. Dolan*, 283 Mont. 245, 256, 940 P.2d 436, 442 (1997). This finding, however, was based specifically on a provision of Montana's constitution and avoided a discussion of the Fourth Amendment of the U.S. Constitution. *See* MONT. CONST. art. II, § 10. Florida has likewise found an expectation of privacy in medical records based upon a provision of its own constitution. *State v. Johnson*, 814 So.2d 390, 393

In a more recent case, an Ohio court went into detail about the split between the states in their determination as to whether a person suspected of a crime has a reasonable expectation of privacy in his medical records. *State v. Little*, 23 N.E.3d 237, 245 (Ohio Ct. App. 2014). The Ohio court ultimately found persuasive the reasoning of those courts holding a person suspected of wrongdoing has a reasonable expectation of privacy in his medical records. *Id.* The court looked to this Court's opinion in *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 4250 (2013). It noted when medical records are involved, there are no exigent circumstance or any other reason why law enforcement cannot simply obtain a warrant before searching the relevant medical records. *Little*, 23 N.E.3d at 248-49.

b. Federal caselaw

"A majority of the federal Circuit Courts of Appeals have concluded the constitutional right to privacy extends to medical and/or prescription records." *Skinner*, 10 So.3d at 1217. Indeed at least four Circuit Courts of Appeals have found there to be some degree of a constitutional right to privacy in medical records,

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(Fla. 2002) (noting "[a] patient's medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster") (citing FLA. CONST. art. I, § 23)).

and one has made conflicting statements regarding the matter.

In *Dobbs*, the plaintiff in a 42 U.S.C. § 1983 claim asserted her right to privacy was violated when a state prosecutor "authorized and conducted" a search of her prescription records as part of a criminal investigation into whether she was fraudulently altering dosage amounts. *Douglas v. Dobbs*, 419 F.3d 1097, 1099 (10th Cir. 2005). As part of its analysis, the Tenth Circuit had to determine whether Dobbs had a constitutional right to privacy in her prescription records. The court offered the following reasoning and conclusion:

> Although we have not extended the "zone of privacy" to include a person's prescription records, we have no difficulty concluding that protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy. Information contained in prescription records not only may reveal other facts about what illnesses a person has, but may reveal information relating to procreation – whether a woman is taking fertility medication for example – as well as information relating to contraception. Thus, it seems clear that privacy in prescription records falls within a protected "zone of privacy" and is thus protected as a personal right either "fundamental" to or "implicit in the concept of ordered liberty."

Id. at 1102 (internal citations omitted). The concurrence in that case specifically stated, "search of a pharmacy for such [personal medical information] would implicate a legitimate expectation of privacy under our traditional Fourth Amendment jurisprudence." *Id.* at 1104 (Tymkovich, J., concurring).

In a similar case out of the Fourth Circuit, police obtained medical records from a methadone clinic during the course of a criminal investigation. That court said there was "no question" that a person has an expectation of privacy in his medical records. *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000). The court then proceeded to hold a person likewise has a reasonable expectation of privacy in medical records seized as part of a criminal investigation. *Id.* The court reasoned, "medical treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials."[4] *Id.* As such, the court held society is willing to recognize a criminal suspect's

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[4] The District Court of Ohio used similar language in a case where the DEA sought to subpoena prescription records of people it thought were engaging in criminal activity. In that case, the court "easily conclude[d] that intervenors' subjective expectation of privacy in their prescription information is objectively reasonable. Although there is not an absolute right to privacy in prescription information ... it is more than reasonable for patients to believe that law enforcement agencies will not have unfettered access to their records." *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 998 F.Supp.2d 957, 966 (D. Or. 2014).

expectation of privacy in his potentially inculpatory medical records as objectively reasonable. *Id.*

The Second Circuit reached a similar conclusion when it found there to be a "right to confidentiality" in one's medical records.[5] *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994). The court noted "[e]xtension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over." *Id.*

The Seventh Circuit, noting the split between the circuits on the issue, likewise "recognize[d] a qualified constitutional right to the confidentiality of medical records and medical communications." *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995).

Finally, the Ninth Circuit has recognized both patients and doctors have a reasonable expectation of privacy in medical records under the Fourth Amendment. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir. 2004). The court held "provision of

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[5] This confidentiality versus privacy distinction stems from this Court's discussion in *Whalen* regarding two "interests" included within the constitutionally protected "zone of privacy": "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). The former of these interests is the "right of confidentiality" referred to by the court in this language (as opposed to the latter, which is generally referred to as the "right of autonomy").

medical services in private physicians' offices carries with it a high expectation of privacy for both physician and patient." *Id.* Accordingly, a statute authorizing warrantless searches of abortion clinics violated the Fourth Amendment. *Id.* In making this ruling, however, the court did not address one of its earlier cases holding a person lacks standing to bring a Fourth Amendment claim based upon the search of medical records containing the results of a blood draw done for medical purposes. *U.S. v. Attson*, 900 F.2d 1427, 1433 (9th Cir. 1990).

2. Jurisdictions where there is not a reasonable expectation of privacy in the potentially inculpatory medical records of a person suspected of committing a crime

On the other side of this debate (and in addition to the Texas court below) are state courts of Michigan, New Hampshire, Alabama, Indiana, and Delaware and the Sixth Circuit Court of Appeals.

a. State caselaw

In a case foundational to this line of caselaw, the Supreme Court of Michigan was faced with a prosecutor who obtained, simply by a letter of request and without a warrant, the medical records of people police suspected of DWI. The court held "we do not believe that an expectation of privacy in blood alcohol test results, under these circumstances, is one which society

is willing to consider reasonable." *People v. Perlos*, 436 Mich. 305, 325, 462 N.W.2d 310, 319 (1990). The decision was a four-to-three split. The dissent steadfastly asserted the "intensely personal" nature of medical records imbued such documents with a degree of privacy warranting Fourth Amendment protection. *Perlos*, 436 Mich. at 336, 462 N.W.2d at 324 (Levin, J., dissenting).

The New Hampshire Supreme Court would later adopt the same reasoning as Michigan, concluding,

> society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes in connection with an incident giving rise to an investigation for driving while under the influence of intoxicating liquors or controlled drugs.

State v. Davis, 161 N.H. 292, 298, 12 A.3d 1271, 1276 (2010).[6]

Intermediate courts in Alabama, Indiana, and Delaware have reached similar results. *State v.*

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[6] There is also the related issue of privacy in the pharmaceutical part of a person's medical records. On that issue, the Supreme Court of Nebraska has held "[i]ssuance of a subpoena to a third party to obtain records does not violate the rights of a defendant about whom the records pertain, even if a criminal prosecution is contemplated at the time the subpoena is issued." *State v. Wiedeman*, 286 Neb. 193, 212, 835 N.W.2d 698, 712-13 (2013).

Eichhorst, 879 N.E.2d 1144, 1149 (Ind. Ct. App. 2008) ("[I]n Indiana at least, society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement"); *Tims v. State*, 711 So.2d 1118, 1123 (Ala. Crim. App. 1997) ("We hold that any expectation of privacy that the appellant may have had in the hospital records containing the results of his blood alcohol test was unreasonable...."); *State v. Hartmetz*, No. 1510007362, 2016 WL 3752564, at *5 (Del. Super. Ct. July 6, 2016) ("[W]hatever insulation Fourth Amendment privacy considerations provide with respect to the nondisclosure of medical records generally, does not extend to the disclosure of BAC tests conducted by hospital personnel solely for medical purposes following an automobile accident.").

b. Federal caselaw

The Sixth Circuit, in a case unrelated to the investigation of criminal charges (making it even broader than the issue in the case at hand), held "[d]isclosure of plaintiff's medical records does not rise to the level of a breach of a right recognized as 'fundamental' under the Constitution." *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995).

B. The Decisions of State and Federal Courts Create Tension With Federal Law and This Court's Prior Rulings

A "search" under the Fourth Amendment occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984); *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978) (explaining the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"). This "reasonable expectation of privacy" does not come directly from the Fourth Amendment itself but rather exists "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *United States v. Jones*, 132 S.Ct. 945, 951, 181 L.Ed.2d 911 (2012); *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998).

Courts refusing to find a reasonable expectation of privacy in medical records of criminal suspects have failed to appreciate the increasing value society places on its medical privacy, as recognized by both this Court and Congress. *See*, *e.g.*, *Johnson v. California*, 545 U.S. 162, 164, 125 S.Ct. 2410, 2413, 162 L.Ed.2d 129 (2005) (granting certiorari to resolve a conflict between a federal circuit court and a state high court). And this tension is not on a trivial matter; the issue involved goes

to the core of the Fourth Amendment. Much needed resolution of this tension implicates law enforcement's ability to peer into the most private and sensitive areas of a person's life.

1. This Court's prior rulings indicate the Constitution affords medical records a great degree of privacy

A person's medical records contain highly sensitive information speaking to the very roots of a person's existence – information society universally recognizes as private. *See State v. Dolan*, 283 Mont. 245, 256, 940 P.2d 436, 443 (1997) (stating "[m]edical records are quintessentially 'private' and deserve the utmost constitutional protection"). This Court has discussed the constitutionally protected interest a person has in avoiding "disclosure of personal matters," including medical information. *Whalen v. Roe*, 429 U.S. 589, 598-99, 602, 97 S.Ct. 869, 876, 878, 51 L.Ed.2d 64 (1977).

Indeed, this Court has formally recognized a "reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital." *Ferguson v. City of Charleston*, 532 U.S. 67, 78, 121 S.Ct. 1281, 1288, 149 L.Ed.2d 205 (2001). More recently, this Court refused to allow warrantless searches even though "the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal" and the "governmental interest in combating drunk driving" compelling. *Missouri v. McNeely*, 133 S.Ct. 1552,

1564, 185 L.Ed.2d 696 (2013). In spite of the recognized importance of preventing drunk driving, the Court declined to depart from the warrant requirement absent exigent circumstances. *Id.* at 1565. While *McNeely* focused on the applicability of an exception to the warrant requirement, it remains instructive on the degree of deference this Court affords the privacy interests surrounding blood testing.

2. Congress has recognized the great degree of privacy Americans place in their medical records

Congress likewise recognized the increasing importance society places upon medical records when it implemented the Privacy Rule of the Health Insurance and Accountability Act (HIPAA). In the Preamble of the Privacy Rule, Congress looked to the Fourth Amendment as its inspiration when it reasoned,

> [T]he existence of a generalized right to privacy as a matter of constitutional law suggests that there are enduring values in American law related to privacy. For example, the need for security of "persons" is consistent with obtaining patient consent before performing invasive medical procedures. Moreover, the need for security in "papers and effects" underscores the importance of protecting information about the person contained in personal diaries, medical records or elsewhere.

Standards for Privacy of Individually Identifiable Health Information, Final Rule, 65 Fed. Reg. 82,462, 82,464 (Dec. 28, 2000). Congress went on to make two key observations: (i) "[a]mong different sorts of personal information, health information is among the most sensitive"; and (ii) loss of personal privacy is a major concern for millions of Americans. *Id.* at 82,464, 82,465. These concerns were, in large part, the justification for HIPAA.

HIPAA goes so far as to make disclosure of medical records mandatory only if the individual requests access to the information himself or herself. *Id.* at 82,677. Even compliance with court orders is discretionary. *Id.* In explaining this rule, Congress stated "[u]nder the statutory framework adopted by Congress in HIPAA, *a* ***presumption*** *is established* that the data contained in an individual's medical record *belongs to the individual* and must be protected from disclosure to third parties." *Id.* (emphasis added).

Another purpose of HIPAA was to create "a set of basic national privacy standards." *Id.* at 82,464. At the time, the amount of privacy states afforded medical records varied "significantly." *Id.* In passing HIPAA Congress recognized the need for federal intervention due to the wide variance in the amount of privacy states gave medical records. As detailed above, a similar variance and concomitant need for resolution is manifested in the widely varied decisions of state high courts and federal circuit courts. Intervention by this Court is necessary to again create a floor on the amount of privacy a person has in his or her medical

records. The nation needs harmonization and guidance on how much protection medical records receive. This is especially true recognizing the significant changes undergone by our society in the last thirty years and the resulting increased value society continues to give privacy, as recognized by Congress.

C. The Decision of the Court Below Was Wrong Because the Search of Petitioner's Medical Records Was Not Reasonable

Apart from the tension between the case below and the statements of both this Court and Congress, along with the fact an opposite result would have been reached in other state and federal courts, the decision below worked an egregious violation of Petitioner's rights. As established above, the prosecutor searched Petitioner's complete medical records on mere suspicion of DWI without first going through any of the traditional safeguards of review by a neutral judicial entity. That search was not reasonable.

In approving a prosecutor's unilateral, unlimited, and unsupervised perusing through a man's "entire medical records," the Texas court disregarded one of the most fundamental aspects of the Fourth Amendment: if law enforcement has the opportunity to get a warrant, it ought to. *See Chapman v. United States*, 365 U.S. 610, 614-15, 81 S.Ct. 776, 778-79, 5 L.Ed.2d 828 (1961). Medical records are stationary and unchanging. Any time a police officer or prosecutor wants to obtain those records, and if he has probable cause to

do so, it is simply a matter of filling out a form and emailing the magistrate. The fact the prosecutor waited forty-five days before subpoenaing the medical records proves there were no exigent circumstances justifying circumvention of neutral review. *See Birchfield v. North Dakota*, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) (reciting "[t]he exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant") (citing *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)). There were no other justifiable reasons for the prosecutor not actually obtaining such review. The prosecutor subpoenaed Petitioner's medical records whenever he wanted, for whatever reason he wanted, without any review or oversight. Were society in general to know about the power now given to law enforcement and other state actors, it would be repulsed.

D. HIPAA Preempts Texas Law

If a state law conflicts with any part of HIPAA, HIPAA prevails. "A standard, requirement, or implementation specification adopted under [HIPAA] that is contrary to a provision of State law preempts the provision of State law." 45 C.F.R. § 160.203.

> Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means:

> (1) A covered entity or business associate would find it impossible to comply with both the State and Federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act, section 264 of Public Law 104-191, or sections 13400-13424 of Public Law 111-5, as applicable.

Id. § 160.202.

The ruling of the court below evinces two ways in which Texas law is contrary to HIPAA. First, Texas's scheme allowing a prosecutor to act as both prosecutor and one-man grand jury is contrary to HIPAA's disclosure exceptions. Moreover, the ruling of the court below is an affront to HIPAA's general purpose of properly protecting a person's medical records and overall recognition of the sanctity of medical records in the eyes of society.

1. Texas law permitting a prosecutor to obtain medical records via a sham grand jury subpoena is contrary to HIPAA's provision, which contemplates only a true grand jury subpoena

In this case, the prosecutor himself signed a "Grand Jury Subpoena" as the foreman. This practice is commonly utilized in Texas.[7] Although technically

[7] The statutory "good faith" exception in Texas requires an initial finding of probable cause. *Curry v. State*, 808 S.W.2d 481,

permissible, the prosecutor intentionally employed pretext in issuing a deceptive artifice designed to circumvent the protections of a magistrate or an actual grand jury. In doing so, he was able to unilaterally compel the hospital to produce the full medical records of a person without any of the traditional protections of review by a neutral party.[8] The protections include the presence of probable cause and a search of properly limited scope, both of which were at issue in this case.

The court below found HIPAA justified the prosecutor's actions because, after all, there was a subpoena issued, and it was technically valid under Texas law.

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482 (Tex. Crim. App. 1991). Moreover, the Court of Criminal Appeals questioned the legality of the second subpoena actually issued by the grand jury. *See Wehrenberg v. State*, 416 S.W.3d 458, 465 (Tex. Crim. App. 2013) (noting the independent source doctrine is applicable only where the evidence was obtained by legal means and that evidence not legally obtained does not receive the benefit of the independent source doctrine).

[8] After the prosecutor executed the "Grand Jury Subpoena," he took it to the Clerk of the Court, who then issued the subpoena. HIPAA does permit disclosure to comply with a subpoena issued by a judicial officer. 45 C.F.R. § 164.512(f)(1)(ii)(A). Caselaw indicates, however, a court clerk is not a judicial officer for HIPAA purposes. *See Garcia-Velazquez v. Frito Lay Snacks Caribbean*, 358 F.3d 6, 10 (1st Cir. 2004) (noting that clerk office employee was not a judicial officer in addressing the unique circumstances doctrine); *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 105 (5th Cir. 1995) (holding "in the absence of specific instructions from a 'judicial officer,' the clerk of the court lacks authority to refuse or to strike a pleading presented for filing"); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 150-51 (2d Cir. 1999) (finding a clerk is not a judicial employee for purposes of the unique circumstances doctrine); *United States v. Unger*, 700 F.2d 445, 453 (8th Cir. 1983) (stating "clerk of the court [ ] is not a judicial officer").

This reasoning is repugnant to the plain language of HIPAA. Under HIPAA's Privacy Rule,

> (f) A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official ...
>
> ...
>
> (ii) In compliance with and as limited by the relevant requirements of:
>
> (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;
>
> (B) A grand jury subpoena; or
>
> (C) An administrative request [meeting listed certain requirements]

45 C.F.R. § 164.512(f)(1)(ii). A "law enforcement official," is "an officer or employee of any agency or authority of the United States [or] a State ... who is empowered by law to ... [p]rosecute or otherwise conduct a criminal ... proceeding arising from an alleged violation of law." *Id.* § 164.103. A prosecutor is a law enforcement official. It makes no sense to conclude Congress intended a loophole in HIPAA where the prosecutor, a law enforcement official by definition, is required to obtain a grand jury subpoena that he himself can issue. Congress clearly did not envision the prosecutor as both a prosecutor and one-man grand jury. Had Congress imagined Texas's scheme, the provision requiring a prosecutor to obtain a grand jury subpoena would be pointless.

Much like the Fourth Amendment itself, HIPAA recognizes the importance of involving a neutral entity from the judicial branch in breaching a person's medical records. *See* 45 C.F.R. § 164.512(f)(ii); *Chapman*, 365 U.S. at 615, 81 S.Ct. at 779 ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."). HIPAA clearly envisions piercing the veil of privacy afforded medical records *via some kind of judicial process*. After all, the grand jury – as an ostensive part of the judicial branch – remains a bulwark between the citizen and the government. Despite the intimate relationship between a prosecutor and a grand jury, surely Congress did not conceive of a situation where the prosecutor is literally allowed to sign as the foreman of the grand jury in subpoenaing people and records, without consulting or convening any grand jury. To the extent HIPAA's Privacy Rule provides more protection for a person by requiring an actual grand jury subpoena, it must preempt the Texas provision permitting a prosecutor to act with the unfettered authority of a grand jury. *See* 45 C.F.R. § 160.203.

2. Texas law is contrary to provisions of HIPAA forbidding disclosure of entire medical records to law enforcement officials

As recited above, a state law is contrary to HIPAA if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of

HIPAA. 45 C.F.R. § 160.202. HIPAA's Privacy Rule was created, in part, to establish (i) a presumption that a person's medical records ought not be disclosed absent a very strict set of safeguards and (ii) a set of national standards protecting a person's medical records. 65 Fed. Reg. at 82,464, 82,677.

The ruling of the court below permits one person, acting on behalf of the state for purposes of developing a criminal case against an individual, to search through a man's medical records without any limitations or oversight. This power is an affront to HIPAA's objective of protecting a person's medical records and permitting disclosure for law enforcement purposes only if there is intervention by a judicial entity. See 45 C.F.R. § 164.512(f). HIPAA permits a covered entity to disclose medical information in response to a court order, grand jury subpoena, or administrative subpoena. *Id.* § 164.512(f)(1)(ii). It also contains a specific provision establishing what a covered entity may disclose to a law enforcement official. Under HIPAA, a covered entity may disclose a very limited amount of information from a person's medical records[9] to a law enforcement

[9] The covered entity may disclose only the following information:

(A) Name and address;

(B) Date and place of birth;

(C) Social security number;

(D) ABO blood type and rh factor;

(E) Type of injury;

(F) Date and time of treatment;

(G) Date and time of death, if applicable; and

official, without any involvement of a judicial entity. *Id.* § 164.512(f)(2). The covered entity may only disclose such information if the law enforcement official is requesting the information "for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person." *Id.*

HIPAA expressly forbids disclosure of a person's "analysis of body fluids or tissue" to a law enforcement official who has requested disclosure without first obtaining a court order or a grand jury subpoena. *Id.* § 164.512(f)(2)(ii). The ruling of the court below conflicts with this clear provision of HIPAA. Accordingly, HIPAA's Preemption Clause forbids application of the Texas rule.

(H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

45 C.F.R. § 164.512(f)(2)(i).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the judgment of the Texas Court of Criminal Appeals in *State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016) (App. 1a).

Dated October 13, 2016.

Respectfully submitted,

ALLISON CLAYTON
Counsel of Record
THE LAW OFFICE OF
B. ALLISON CLAYTON
P.O. Box 64752
Lubbock, Texas 79464
806-773-6889
888-688-4515 (facsimile)
Allison@AllisonClaytonLaw.com

CHUCK LANEHART
CHAPPELL, LANEHART & STANGL, P.C.
1217 Avenue K
Lubbock, Texas 79401
806-765-7370
806-765-8150 (facsimile)
ChuckLanehart@
LubbockCriminalDefense.com

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

NO. PD-0433-14

THE STATE OF TEXAS
v.
HAYDEN HUSE, Appellee

ON APPELLEE'S PETITION
FOR DISCRETIONARY REVIEW

FROM THE SEVENTH COURT OF APPEALS
LUBBOCK COUNTY

YEARY, J., delivered the opinion of the Court in which KELLER, P.J. and MEYERS, KEASLER, HERVEY, ALCALA and RICHARDSON, JJ., joined. NEWELL, J., concurred in the result. JOHNSON, J., dissented.

O P I N I O N

In this prosecution for the misdemeanor offense of driving while intoxicated, the State obtained evi-

dence of Appellee's blood-alcohol concentration by issuing a grand jury subpoena for his hospital medical records. The trial court granted Appellee's motion to suppress on two grounds relevant to Appellee's current petition for discretionary review: 1) that obtaining Appellee's medical records without a warrant violated the Fourth Amendment, necessitating suppression under both the federal exclusionary rule and Article 38.23 of the Texas Code of Criminal Procedure; and 2) that a misuse of the grand jury subpoena process caused the State's acquisition of Appellee's medical records to violate both state and federal law, also requiring suppression of the evidence under our state exclusionary rule, Article 38.23. U.S. CONST. amend. IV; TEX. CODE CRIM. PROC. art. 38.23. The State appealed. TEX. CODE CRIM. PROC. art. 44.01(a)(5).

In an unpublished opinion, the Seventh Court of Appeals reversed the trial court's order suppressing the evidence. *State v. Huse*, No. 07-12-00383-CR, 2014 WL 931265 (Tex. App.—Amarillo Mar. 6, 2014) (mem. op., not designated for publication). The court of appeals held that the trial court erred in that, respectively: 1) under this Court's opinion in *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997), Appellee

lacked standing to raise a Fourth Amendment challenge to the State's acquisition of his medical records; and 2) the State did not acquire Appellee's medical records through an unlawful grand jury subpoena, so it was not necessary to suppress them under Article 38.23. *Huse*, 2014 WL 931265, at *46.

We granted Appellee's petition for discretionary review to address two issues. First, does the advent of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[1] materially impact this Court's holding in *Hardy* with respect to Fourth Amendment

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[1] As the Fourteenth Court of Appeals has noted elsewhere:

> On August 21, 1996, Congress enacted HIPAA to "improve portability and continuity of health care coverage in the group and individual markets, to combat waste, fraud, and abuse in health care and health care delivery." Pub.L. No. 104-191, 110 Stat. 1936 (1996). Congress also instructed the Secretary of Health and Human Services to promulgate "final regulations" containing "standards with respect to the privacy of individually identifiable health information" should Congress fail to enact such privacy standards within 36 months of the HIPAA enactment. 110 Stat. 2033-34. * * * On February 13, 2001, the Secretary promulgated final regulations that restrict and define the ability of covered entities, i.e., health plans, health care clearinghouses, and health care providers, to divulge patient medical records.

Tapp v. State, 108 S.W.3d 459, 462-63 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd.). It is to those regulations that we refer in the remainder of this opinion.

standing to complain of the State's acquisition of specific medical records? And second, did the State acquire Appellee's medical records by way of a grand jury subpoena process that violated either HIPAA or state law, thus necessitating that they be suppressed under Article 38.23? We ultimately answer both questions "no." Accordingly, we will affirm the judgment of the court of appeals.

I. BACKGROUND

The Facts

The facts of the case were largely stipulated to by the parties in the trial court and are not in serious dispute. They show the following time-line:

- On February 13, 2010, at approximately 2:00 o'clock in the morning, Appellee missed a curve and plowed his car into a cotton field.
- Lubbock County Deputy Sheriffs who responded to the scene detected the odor of alcohol on Appellee's breath. They transported him to the Covenant Medical Center in Lubbock.
- Appellee's blood was drawn for medical purposes at 4:50 a.m. Later analysis of his blood revealed a blood alcohol concentration of .219.
- Department of Public Safety Trooper Troy McKee met with Appellee at the hospital at approximately 5:15 a.m. He also noticed the odor of alcohol on Appellee's breath as well as other signs of alcohol ingestion. Appellee admitted to having had six or seven beers between 7:30 and 11:30 the previous evening. Appellee refused McKee's request for a specimen of breath or blood for blood alcohol analysis, and McKee did not attempt to compel one.
- On March 30, 2010, based on McKee's offense report, a Lubbock County Assistant District Attorney

filed an application for a grand jury subpoena duces tecum to obtain Appellee's medical records for the February 13 incident. The subpoena issued by the District Clerk to Covenant Medical Center required an employee of the hospital to appear before the grand jury but stated that the hospital could comply by simply calling the District Attorney's office, presumably to arrange delivery of Appellee's medical records from that day to the Assistant District Attorney. No grand jury was actively investigating Appellee. Neither was any grand jury involved in the issuance of the subpoena, nor were the medical records required to be, nor ever actually were, returned to a grand jury.

- On March 31, 2010, the day after the subpoena duces tecum issued, Appellee was formally charged by information with the misdemeanor offense of driving while intoxicated.
- On April 15, 2010, Covenant Medical Center complied with the subpoena duces tecum, providing Appellee's medical records from February 13 to the District Attorney's office, along with a business record affidavit.
- On March 14, 2011, almost a year later, Appellee amended an earlier-filed motion to suppress to argue for the first time that his medical records should be suppressed as the product of a grand jury subpoena that violated both state law and HIPAA.

No hearing was immediately conducted on Appellee's motion to suppress.

- On September 27, 2011, while Appellee's motion to suppress was still pending, the State moved to dismiss the information against Appellee, which was granted.
- On October 5, 2011, a new grand jury subpoena duces tecum issued, this time on the basis of an application that was actually signed by the foreman of the grand jury. But, as before, the subpoena issued by the District Clerk to Covenant Medical Center stated that the hospital could comply by simply contacting the District Attorney's office, to arrange delivery of Appellee's medical records to the Assistant District Attorney. It is unclear whether the medical records were ever actually returned to a grand jury. But no grand jury ever issued an indictment against Appellee.
- On October 6, 2011, the next day, Appellee was once again charged by information with driving while intoxicated on February 13, 2010. Appellee's pre-trial motions were carried over to the new information.
- On October 11, 2011, Covenant Medical Center complied with the second grand jury subpoena by supplying the same medical records directly to the Assistant District Attorney with a second business record affidavit.

- On January 25, 2012, the trial court conducted a hearing on Appellee's motion to suppress. As summarized by the court of appeals, "[i]n addition to testimony of Trooper McKee, the facts surrounding the subpoena process and the obtaining of the medical records were stipulated to between the State and Appellee, leaving only the issue of whether Appellee's medical records were illegally obtained and, therefore, excludable." 2014 WL 931265, at *2.
- On August 6, 2012, the trial court granted Appellee's motion to suppress.
- On November 30, 2012, the trial court filed written findings of fact and conclusions of law in support of its grant of Appellee's motion to suppress.

The Trial Court's Findings and Conclusions

After setting out the above uncontested facts, the trial court prefaced its formal conclusions of law with a "discussion," which included the following observations: "Because the State failed to establish that an actual grand jury investigation existed or that other legislative authority or a warrant authorized its actions, the State's use of the grand jury subpoena(s) appears to be an illegitimate exercise of authority. It is this court's opinion, that the use of a grand jury subpoenas [sic] for purposes wholly unrelated to actual

grand jury investigations is inappropriate." It is not altogether clear from these observations whether the trial court concluded that both the March 30th grand jury subpoena and the October 5th grand jury subpoena were unlawful, or just the March 30th grand jury subpoena. The trial court's formal conclusions of law do not entirely resolve this ambiguity. They read, almost in their entirety, as follows:

1) Defendant has standing to present his Motion to Suppress, including, but not limited to, challenging the process by which the State seized the medical records. This case is distinguishable from *Hardy* in at least two significant ways: first, *Hardy* was decided before HIPAA compliance was mandated; second, the subpoenas in this case seek *any and all medical records* and are not limited to merely blood tests.

2) HIPAA legislatively creates an expectation of privacy in medical information in the custody of a covered health care provider.

3) A general demand by the State for "any and all" medical records infringes upon protected privacy interests, even apart from HIPAA.

4) HIPAA provides means by which the State may lawfully obtain medical records.

5) The State obtained Mr. Huse's health information from a covered healthcare prov[id]er based upon a grand jury subpoena.

6) The 3/30/10 grand jury subpoena issued by the State was defective because it did not meet legislative requirements because no actual grand jury was involved with that subpoena. Therefore, the 3/30/10 subpoena was insufficient to satisfy HIPAA's grand jury subpoena exception.

7) The medical records obtained pursuant to the 3/30/10 subpoena were in violation of HIPAA.

8) The 10/05/11 grand jury subpoena does not cure the 3/30/10 subpoena's HIPAA violation.

9) The State failed to demonstrate any attenuation of the taint.

10) The State did not acquire the records via a warrant and no exception to the warrant requirement has been established.

11) Article 38.23 applies because the State did not comply with federal and/or state law when obtaining Huse's medical information.

12) This case presents no exigent circumstances. There is little danger that the evidence would be destroyed or that a delay in obtaining a search warrant would have jeopardized the

investigation. Medical records, unlike alcohol in one's blood, do not dissipate over time.

13) The grand jury subpoenas were used to seize Huse's protected medical records for law enforcement purposes rather than to bring a witness or evidence before a grand jury for grand jury purposes. Such an action is not authorized by the grand jury subpoena statute and is, therefore, unlawful.[2]

14) The doctrine of inevitable discovery is not available under Texas law; thus, the medical records that were originally obtained in an unlawful manner must be suppressed from evidence in the current DWI case against Defendant, even if the Court finds that they were subsequently obtained in a lawful manner.[3]

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[2] This conclusion of law, couched as it is in the plural form (*i.e.*, "subpoena*s*"), would seem to constitute a ruling that *both* grand jury subpoenas were "unlawful." On the other hand, Conclusion Numbers 6 and 7, *ante*, only seem to hold the first grand jury subpoena to be expressly unlawful, and Conclusion Numbers 8 and 9 then address whether the taint attendant to the unlawfulness of the first grand jury subpoena operates also to invalidate the second. Such an inquiry would seem to be beside the point if the second grand jury subpoena were itself unlawful. Thus, the ambiguity persists.

[3] A fifteenth (and final) conclusion of law pertained to an issue that is not before us in this petition for discretionary review. Although the court of appeals reached the issue, Appellee does not

Thus, the trial court apparently ruled that Appellee's medical records were subject to suppression both 1) under the Fourth Amendment exclusionary rule, because in the absence of a valid grand jury subpoena, a warrant was required, and also 2) under Article 38.23 of the Code of Criminal Procedure, because the grand jury subpoena process was unlawfully invoked. In separate points of error on appeal, the State challenged these conclusions. *See* TEX. CODE CRIM. PROC. art. 44.01(5) (permitting the State to appeal the granting of a motion to suppress evidence).

The Court of Appeals Opinion

The court of appeals sustained both of the State's arguments. First, the court of appeals rejected the trial court's conclusion that Appellee had standing to raise the Fourth Amendment issue. Relying upon its own earlier opinion in *Kennemur v. State*, 280 S.W.3d 305, 311-12 (Tex. App.—Amarillo 2008, pet. ref'd), the court of appeals held that HIPAA did not affect *Hardy*'s narrow holding that "whatever interests society may have in safeguarding the privacy of medical records [in general], they are not sufficiently strong [as] to require protection of blood-alcohol test results from tests taken

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complain of its disposition in his petition, and we need not address it.

by hospital personnel solely for medical purposes after a traffic accident." *Huse*, 2014 WL 931265, at *4-5; *see Hardy*, 963 S.W.2d at 527. The court of appeals noted that, in fact, HIPAA expressly recognizes that such records may be subject to disclosure by hospital personnel if they suspect the commission of a crime while providing emergency care. *Huse*, 2014 WL 931265, at * 5 (quoting *Kennemur*, 280 S.W.3d at 312, which in turn quotes 45 C.F.R. § 164.512(f)(6)(I), expressly allowing a health care provider to disclose otherwise protected emergency health care information to law enforcement when to do so "appears necessary" to report a crime). On the strength of the continuing viability of our holding in *Hardy*, the court of appeals held that Appellee lacked a legitimate expectation of privacy in his blood-alcohol test records to justify mounting a Fourth Amendment challenge. *Id.*

Addressing the second issue, the court of appeals began its analysis with the questionable premise that "the trial court made no finding in its *Conclusions of Law* that the second grand jury subpoena was defective." *Id.* at *6.[4] Noting that the second grand jury sub-

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[4] As we have already indicated, it is not nearly as clear to us as it was to the court of appeals that the trial court drew no such conclusion. *See* note 2, *ante*.

poena application was signed by the grand jury foreman, the court of appeals concluded that it was therefore lawful under HIPAA, which also expressly provides for the disclosure of medical records pursuant to a grand jury subpoena. *Id.* (citing 45 C.F.R. § 164.512(f)(1)(ii) (B)). The court of appeals was satisfied that the grand jury foreman's signature was enough to satisfy HIPAA's grand jury subpoena provision. *Id.* Because Appellee's medical records were obtained pursuant to the second, valid grand jury subpoena, the court of appeals reasoned, and because "Appellee failed to establish any causal connection between issuance of the first and second subpoenas," the records were not "obtained" in violation of HIPAA. *Id.* Accordingly, the court of appeals concluded, the trial court erred to apply Article 38.23 to suppress them. *Id.* We granted Appellee's petition to examine each of these discrete holdings.

II. FOURTH AMENDMENT STANDING

Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV. This provision "protects people, not places." *Katz v.*

United States, 389 U.S. 347, 351 (1967). But for that very reason, the right is a personal one that cannot be invoked vicariously on behalf of another. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). As we observed in *Chapa v. State*, 729 S.W.2d 723, 727 (Tex. Crim. App. 1987), "[i]n *Rakas v. Illinois*, the substantive question of what constitutes a 'search' for purposes of the Fourth Amendment was effectively merged with what had been a procedural question of 'standing' to challenge such a search."

Moreover, what constitutes a "search" for Fourth Amendment purposes—and hence, what may serve to confer Fourth Amendment "standing" consistent with Rakas—may be predicated, the Supreme Court has recently emphasized, on either an intrusion-upon-property principle or a reasonable-expectation-of-privacy principle. *United States v. Jones*, 132 S.Ct. 945 (2012); *Florida v. Jardines*, 133 S.Ct. 1409 (2013); *see also Ford v. State*, 477 S.W.3d 321, 328 (Tex. Crim. App. 2015) ("A Fourth Amendment claim may be based on a trespass theory of search (one's own personal 'effects' have been trespassed), or a privacy theory of search (one's

own expectation of privacy was breached).”). Appellee has not argued, either in the court of appeals or in this Court, that he maintains a property interest in his medical records,[5] nor did the court of appeals address such a theory of standing. We therefore limit our consideration to the propriety of the court of appeals's holding that Appellee lacked a reasonable expectation of privacy in his medical records, at least insofar as they reflected the results of the blood alcohol test results.[6] More particularly, we will review the court of

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[5] This Court has held that, when it comes to legal representation, “[t]he client's file belongs to the client[,]” not his attorney. *In re McCann*, 422 S.W.3d 701, 704 (Tex. Crim. App. 2013). Appellee has made no analogous argument that, similarly, a patient's medical records “belong to” the patient, such that he has Fourth Amendment standing on *that* basis to complain of the State's warrantless acquisition of them. In the absence of briefing on that issue, we will not address it *sua sponte* on discretionary review.

[6] The trial court suppressed all of the medical records from Appellee's treatment at the Covenant Medical Center from February 13, 2010—all 74 pages of them—and not just that portion of the medical records reporting the results of the blood-alcohol analysis. On appeal, the State seems to have contended only that the trial court erred to suppress the results of the blood alcohol analysis, arguing that to suppress at least that portion of the medical records was inconsistent with this Court's narrow holding in *Hardy*. The State does not seem to contend that the trial court erred to suppress the balance of the medical records, and so, as in *Hardy* itself, we need not reach that question. Because our holding reaches only the question of whether the blood alcohol analysis

appeals's conclusion that *Hardy*'s holding in this regard remains unaffected by the subsequent enactment of HIPAA.

Hardy

In *Hardy*, we explicitly recognized that, when the State itself extracts blood from a DWI suspect, and when it is the State that conducts the subsequent blood alcohol analysis, two discrete "searches" have occurred for Fourth Amendment purposes. 963 S.W.2d at 52324. Here, as in *Hardy*, the State neither extracted Appellee's blood nor instigated the blood alcohol analysis, and "the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on [its] own initiative," such as the one that the hospital conducted in the context of treating Appellee. *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 614 (1989). So Appellee has no standing to (and does not now) complain of either the blood extraction or the blood alcohol analysis themselves. He argues only that the State's acquisition of the medical records—that re-

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should have been suppressed, the trial court's purported distinction between this case and *Hardy*, expressed in its first conclusion of law, *see* page 6, *ante*, is moot.

flect the *result* of those *private* intrusions (the extraction of blood and the blood alcohol analysis)—*itself* constitutes a discrete governmental search to which Fourth Amendment protections extend. To answer that question in *Hardy*, we inquired whether society recognizes as reasonable any expectation of privacy, not in medical records as a general rule, but in that subset of privately generated and maintained medical records that would show the result of a blood alcohol analysis in an individual that the State suspects of driving while intoxicated. 963 S.W.2d at 525-27. We concluded that the answer to this narrower question is "no."

Analogizing to *United States v. Jacobsen*, 466 U.S. 109 (1984), we pointed out that Hardy's expectation of privacy had already been frustrated to a certain extent by the fact that a private party had already extracted and analyzed his blood. In *Jacobsen*, we explained, employees of a private freight company had already opened a package and, upon discovering a white powdery substance, notified federal agents. *Hardy*, 963 S.W.2d at 526. The only additional search conducted by the government itself was to test the privately exposed substance for the presence of contraband. *Id*. But, since the test was designed to reveal nothing about the substance *except* whether it was contraband, and an individual can have no reasonable expectation of privacy in

the possession of contraband, the analysis of the substance was not regarded as a "search" for Fourth Amendment purposes. *Id.* We went on to compare the chemical analysis of the white powdery substance in *Jacobsen* to the acquisition of medical records in *Hardy*:

> A subpoena for blood alcohol and drug information about the driver in an automobile accident is somewhat analogous to the chemical test in *Jacobsen*. A subpoena directed solely at blood alcohol and drug tests would, like the chemical test in *Jacobsen*, be a very narrow investigatory method designed to elicit evidence for a very narrow purpose.

Id. This very narrow purpose was one, we found, that society as a whole was more than willing to endorse as a legitimate justification for invading the privacy of DWI suspects, as evidenced by the universality of implied consent statutes across the country that compel the extraction and analysis of their breath or blood for chemical analysis. *Id.* at 526-27. Indeed, we noted, obtaining medical records of privately conducted blood extraction and analysis is much less invasive than either the extraction or the chemical analysis themselves. *Id.* at 527. In light of these considerations, we concluded that, "whatever interests society may have

in safeguarding the privacy of medical records [in general], they are not sufficiently strong to require protection of blood-alcohol test results taken by hospital personnel solely for medical purposes after a traffic accident." *Id.*

HIPAA

Does HIPAA now undercut the Court's analysis in *Hardy*? The court of appeals concluded that it did not, and we agree. We have no doubt that HIPAA might support a broader claim that society now recognizes (if it did not already) that a patient has a legitimate expectation of privacy in his medical records *in general*. Indeed, we recognized in *Hardy* that there was already a suggestion in our case law, even before the advent of HIPAA, that such a reasonable expectation might exist, both in dicta, in *Richardson v. State*, 865 S.W.2d 944, 952-53 & n.7 (Tex. Crim. App. 1993), and in a plurality opinion, *State v. Comeaux*, 818 S.W.2d 46 (Tex. Crim. App. 1991) (plurality opinion). *Hardy*, 963 S.W.2d at 518-19; *see also Ford*, 477 S.W.3d at 334 (acknowledging that there might be contexts in which there is "a jurisprudential reason to stray from the third-party doctrine" by which a defendant is deemed to lack a reasonable expectation of privacy in otherwise personal information that is disclosed to a cell-phone service provider and contained in that provider's records). But that broader issue is not before us here—just as it was not before us in *Hardy*.[7]

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[7] We acknowledged both *Richardson* and *Comeaux* in *Hardy*, but observed that "the existence of a reasonable expectation of privacy in physician-patient communications, generally,

With respect to the narrower issue that we actually *did* decide in *Hardy*, HIPAA actually serves to bolster our holding. While codifying a broad requirement of patient confidentiality in medical records, HIPAA nonetheless provides specific exceptions in which the disclosure of otherwise protected health care information is permitted. Section 164.512(f)(1)(ii)(B) of Title 45 of the Code of Federal Regulations, for example, allows for the disclosure of "protected health information" when to do so is "[i]n compliance with and as limited by the relevant requirements of . . . [a] grand jury subpoena[.]"[8] Under this provision, a DWI offender would have no legitimate expectation of privacy sufficient to block a health care provider from disclosing otherwise protected health care information when required to do so under the terms of a grand jury subpoena. *Hardy* itself involved the disclosure of medical records, including the results of blood alcohol testing, that the State obtained pursuant to a grand jury sub-

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does not necessarily mean that medical records would carry an expectation of privacy in every situation." 963 S.W.2d at 519.

[8] Under the rubric of "Standard: Disclosure for law enforcement purposes[,]" 45 C.F.R. § 164.512(f)(1)(ii)(B) permits the "disclosure [of] protected health information" when it is "[i]n compliance with and as limited by the relevant requirements of . . . [a] grand jury subpoena[.]"

poena. 963 S.W.2d at 518. Assuming that such disclosures occur under circumstances sufficient to meet the conditions prescribed, whatever insulation HIPAA provides against third-party disclosure of medical records *in general* does not extend to the disclosure of "blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident."[9] *Hardy*, 963 S.W.2d at 527.

The court of appeals did not err to conclude that *Hardy's* narrow holding remains valid with respect to Fourth Amendment standing, even in light of the subsequently enacted provisions of HIPAA.

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[9] We are not at this juncture concerned with the question of whether the conditions under which 45 C.F.R. § 164.512(f)(1)(ii)(B) would permit disclosure were actually satisfied in this case. That is the province of our discussion of Appellee's second ground for review, whether the specific provisions of HIPAA, or any provision of state law that governs grand jury subpoenas, may have been violated so as to trigger Article 38.23's statutory exclusionary rule. *See* TEX. CRIM. PROC. art. 38.23(a) ("No evidence obtained by an officer . . . in violation of any provisions of the . . . laws of the State of Texas, . . . or laws of the United States of America, shall be admitted in evidence against an accused on the trial of any criminal case."). Here we mean only to point out that the existence of this exception to HIPAA's general rule against disclosure of medical information only serves to reinforce our conclusion in *Hardy* that any reasonable expectation of privacy that society may be prepared to recognize in health care information in general does not extend to evidence that is the subject of a legitimate investigation into the offense of driving while intoxicated.

Finally, Appellee points to a particular provision in HIPAA mandating that, in the event of a conflict between provisions of state law and the limitations on disclosure of medical information contained in HIPAA itself, it is the federal law that must prevail over the state law unless the state law is more protective of an individual's privacy interests. 45 C.F.R. § 160.203(b).[10] From this, Appellee seems to argue that we must abandon our holding in *Hardy* because it represents state common law that is less protective than—and therefore preempted by—this preemption provision in HIPAA. Our response to this contention is twofold. First, *Hardy*'s resolution of the issue of Fourth Amendment standing was a holding of federal constitutional dimension, not a state-law ruling. We therefore perceive no conflict between state law and HIPAA that must be resolved in favor of the latter. Second, and in any event, even assuming that *Hardy* represented a holding of state-law dimension, it is not inconsistent with HIPAA.

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[10] This provision reads: "A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met: . . . (b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification under subpart E of part 164 of this subchapter."

The blood alcohol test results in *Hardy* were obtained via a grand jury subpoena. 963 S.W.2d at 518, 527. As we have already observed, HIPAA expressly permits the disclosure of otherwise "protected health information" when it is sought by way of a grand jury subpoena. In short, nothing about HIPAA's preemption provision prohibits us from relying upon HIPAA itself as confirmation that society has *still* not recognized a reasonable expectation of privacy in "blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident"—at least not an expectation of privacy compelling enough to withstand invasion by a grand jury subpoena. For these reasons, it is Appellee's preemption argument, not our limited holding in *Hardy*, that must fall.

III. ARTICLE 38.23

Under Article 38.23(a), evidence obtained in violation of state or federal law may not be admitted against the accused at his trial. TEX. CODE CRIM. PROC. art. 38.23(a). Thus, quite apart from Appellee's Fourth Amendment contention, his motion to suppress may have been valid if one or both of the grand jury

subpoenas about which he complains was defective under either HIPAA or state statutory provisions governing their issuance.

The court of appeals believed that "the trial court made no finding . . . that the second grand jury subpoena was defective." *Huse*, 2014 WL 931265, at *6. As we have already observed, however, the trial court's written findings of fact and conclusions of law are at least ambiguous on that score, and an argument can be made that it found *both* grand jury subpoenas *duces tecum* to have been unlawfully issued, not just the first one. The court of appeals concluded that the second grand jury subpoena *duces tecum* lawfully issued, and it believed that this conclusion essentially mooted the question of whether the first grand jury subpoena *duces tecum* was valid, since the medical records that the State proposed to use against Appellee at his trial were those "obtained" for purposes of Article 38.23(a) via the second grand jury subpoena. *Id.* For our part, we will take the opposite approach. For reasons we will explain, we harbor some doubt with respect to the legality of the second grand jury subpoena *duces tecum*. We conclude, however, that the first grand jury subpoena *duces tecum* issued lawfully, and so we will not ultimately pass on the lawfulness of the second.

Was HIPAA Violated?

HIPAA itself does not set any parameters for what may constitute a valid grand jury subpoena; it simply permits the disclosure of otherwise protected health information "[i]n compliance with and as limited by the relevant requirements of . . . [a] grand jury subpoena." 45 C.F.R. §164.512(f)(1)(ii)(B). It does not purport to prescribe criteria for a valid grand jury subpoena *duces tecum*, as a matter of state or federal law. It would appear, then, that whether protected health information may be disclosed without violating HIPAA is a function of, at most, two circumstances: first, whether a grand jury subpoena *duces tecum* existed, and (perhaps) second, whether it validly issued in accordance with governing state or federal law. Here, the first circumstance was met—twice. Two grand jury subpoenas *duces tecum* issued in this case. That being so, there can be no possible cause to apply Article 38.23's exclusionary rule to a violation of HIPAA itself unless the grand jury subpoenas *duces tecum* somehow failed to comply with the provisions in the Texas Code of Criminal Procedure that authorize their issuance. In short, whether HIPAA was violated wholly devolves into a question of whether one or both of the two grand jury subpoenas *duces tecum* that issued in this case

failed to comport with state law. We believe that the first one—at least—was lawful.

Was State Law Violated?

Grand juries in Texas have the constitutional authority to investigate misdemeanor offenses such as Appellee's. *See* TEX. CONST. art. V, § 17 ("Grand juries empaneled in the District Courts shall inquire into misdemeanors . . ."). Also, "[a] subpoena may summon one or more persons to appear . . . on a specified day . . . before a grand jury[.]" TEX. CODE CRIM. PROC. art. 24.01(a)(2)(C). Either the foreman of the grand jury or "the attorney representing the State" has the authority to "issue a summons" (by which is apparently meant a subpoena) on the grand jury's behalf. TEX. CODE CRIM. PROC. arts. 20.10 & 20.11; George E. Dix & John M. Schmolesky, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 23:27 (3d ed. 2011). "The subpoena may require the witness to appear and produce records and documents." TEX. CODE CRIM. PROC. art. 20.11; *see also* TEX. CODE CRIM. PROC. art. 24.02 ("If a witness have in his possession any instrument of writing or other thing desired as evidence, the subpoena may specify such evidence and di-

rect that the witness bring the same with him and produce it in court."); Dix & Schmolesky, § 23:30, at 783 ("A grand jury subpoena can, under the general authority of Article 24.02 of the Code of Criminal Procedure, direct the witness to bring specified instruments, writings, or 'other thing[s]' in his possession to the grand jury. Such a subpoena is a subpoena duces tecum."). And finally, "[t]he grand jury may compel the production of evidence . . . as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States v. Calandra*, 414 U.S. 338, 343 (1974).

Beyond the bare-bone provisions cited above, the Code of Criminal Procedure provides little guidance with respect to the proper (or improper) use of the grand jury subpoena power. Legal commentators have observed that, in states such as Texas, in which "the subpoena authority appears to be shared by the prosecutor and the grand jury[,] . . . it seems likely as a practical matter that the prosecutor will play the leading role in determining the evidence to subpoena[.]" Sara Sun Beale, et al., 1 GRAND JURY LAW AND PRACTICE § 6:2, at 6-10 (2d ed. 2015). Moreover, "as long as it is fairly clear that the grand jury's subpoenas are being used to further the grand jury's investigation—and

not some separate interest of the prosecutor's—the courts have permitted the prosecutors to make their own decisions as to the issuance of subpoenas." *Id.* at 6-14. Prosecutors "do not have to obtain a grand jury's approval before issuing subpoenas; indeed, a grand jury may not even be aware that a prosecutor is issuing subpoenas on its behalf." Susan W. Brenner & Lori E. Shaw, 1 FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 9:2, at 342 (2d ed. 2006). And there is a presumption of regularity attending the purported acts of a grand jury, which the opposing party has the burden to overcome. Sara Sun Beale, et al., 2 GRAND JURY LAW AND PRACTICE § 9:16, at 9-100 (2d ed. 2012); *Ex parte Rogers*, 640 S.W.2d 921, 923 (Tex. Crim. App. 1982); *see also United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991) ("We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.").

Despite this presumption of regularity, it is well settled that there are at least two purposes to which a prosecutor may *not* legitimately direct a grand jury subpoena. First, he may not use the grand jury subpoena as a subterfuge to obtain an investigative interview in his office—a so-called "office subpoena." Beale, *supra*, at 6-17; Brenner, *supra*, at 343. For example,

"[t]he prosecutor's power to subpoena [on the grand jury's behalf] must not be used as a tool for police officers to force a suspect to talk when he previously refused to do so." *Guardiola v. State*, 20 S.W.3d 216, 225 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). However, "the courts have generally permitted prosecutors to meet with prospective witnesses in advance of their appearances before the grand jury, as long as the interviews with the prosecutors are optional, and as long as the witnesses are given the choice to appear before the grand jury rather than submit to an interview." Beale, *supra*, at 6-17. Second, it has been widely recognized by commentators and courts that have addressed the issue squarely "that it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial[,]" since by that time "the grand jury's investigative role is ended, and the rules of pretrial discovery take effect to govern the extent to which the parties may use the legal process to obtain information about the case." Beale, *supra*, at 9-95, 9-96; *see also* Susan W. Brenner & Lori E. Shaw, 2 FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 21:10, at 234 (2d ed. 2006) ("It is improper to use a grand jury to obtain evidence for use at the trial of one who has already been indicted."); *In re Grand Jury Proceedings*, 814 F.2d 61, 70 (1st Cir. 1987) ("It is well established

that a grand jury may not conduct an investigation for the primary purpose of helping the prosecution prepare indictments for trial."); *see also Rogers*, 640 S.W.2d at 923 ("It has been said that 'it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial.' *United States v. Dardi*, 330 F.2d 316 (2nd Cir. 1964)."). However, commentators have also suggested that a grand jury may continue to investigate *other* potential charges, and "if, in the course of such legitimate investigative efforts, the prosecutor obtains evidence that is relevant to the pending case, it can use that evidence at trial." Beale, *supra*, at 9-98; *see also* Brenner, *supra*, at 234 ("It is not, however, improper for a grand jury to investigate the possibility that one who has been indicted may have committed other crimes even if the investigation discloses evidence relevant to charges in the indictment."). We will examine the grand jury subpoenas *duces tecum* in this case with these principles and practicalities in mind.

The court of appeals seems to have concluded that the second subpoena *duces tecum* was valid because the foreman of the grand jury signed the subpoena application, and his involvement was alone sufficient to invoke the presumption of regularity in grand

jury proceedings.[11] But we hesitate in this case to ratify that apparent conclusion. By the time the second subpoena issued, Appellee had already been charged by information with the offense in this case. While that first information had been dismissed by the time the second subpoena was requested and issued, the second information was filed the very next day after the second subpoena issued. Moreover, by the time the second information was filed, charging Appellee with the same offense as the first, the prosecution was aware of what was contained in the medical records, since it had already obtained the very same records from the very same source in response to its first grand jury subpoena *duces tecum*. These circumstances combine to suggest the possibility that the second subpoena *duces tecum* may not have issued for a legitimate *grand jury* investigative purpose, but solely for the purpose of securing evidence for the prosecution to use against Appellee at trial. If that is the case, it would not matter that the foreman of the grand jury signed the subpoena application—it may still have served an illegitimate

[11] "[T]he medical records produced in this case were produced in response to the second grand jury subpoena, which was itself issued upon the request of the foreman of the grand jury. We will not look beyond the issuance of the subpoena to determine whether the matter is a legitimate matter of consideration by the grand jury." *Huse*, 2014 WL 931265, at *6.

purpose. *Rogers*, 640 S.W.2d at 623. While we do not decide that question today, the wide acceptance of the point of view by other commentators and courts is enough to cause us to hesitate to rely upon the presumption of regularity to sanction the second grand jury subpoena *duces tecum* on the particular facts of this case when, in our opinion, an alternative ground exists which leads us to conclude that the evidence was properly obtained.

We have no hesitation, however, in concluding that the first grand jury subpoena *duces tecum* was proper. The trial court concluded that this subpoena was abusive "because it did not meet legislative requirements because no actual grand jury was involved" in its issuance. However, the trial court did not identify the specific legislative provisions it believed to have been violated. In its findings of fact, it found that the first subpoena *duces tecum* "was not directed to be returned to any actual grand jury." This finding of fact is simply unsupported by the record. The March 30 subpoena was addressed to one "BEVERLY BROOKS" at the Covenant Medical Center, and it expressly commanded her "to appear before the Grand Jury now in session" in Lubbock County with the relevant medical records, "then and there to testify as a witness before said Grand Jury[.]" It also issued before the charging

instrument was filed, albeit only one day before. It is true that the subpoena application was signed by the prosecutor rather than the grand jury foreman. But as we have already noted, this was squarely in keeping with the provisions of the Code. TEX. CODE CRIM. PROC. arts. 20.10 & 20.11.

It is also true that the subpoena offered its recipient, Ms. Brooks, the option of complying by simply by contacting the prosecutor's office—presumably to arrange for delivery of the requested medical records to the prosecutor himself. But this practice does not seem to us to necessarily conflict with any of our grand jury related statutory provisions, and it does not seem to us to necessarily overstep the prosecutor's role to facilitate the investigative function of the grand jury, so long as the recipient retains the option instead to appear before the grand jury itself, as principally commanded. Nor does the statutory scheme necessarily contemplate that the grand jury itself must even have been aware of the grand

jury subpoena at the time it was issued. None of these circumstances surrounding the first grand jury subpoena conflicts with any of the relevant statutory provisions. And even in the aggregate, these circumstances are insufficient to surmount the presumption of regularity of the grand jury proceedings. We hold

that Appellee has failed to establish any illegality attendant to the prosecutor's use of the first grand jury subpoena *duces tecum*. Because the State obtained the medical records in the absence of any specific statutory violation and in the absence of any manifest abuse of the grand jury's ordinary investigative function, Article 38.23(a) does not mandate that the records be suppressed.

CONCLUSION

For these reasons, we affirm the judgment of the court of appeals.

DELIVERED: April 13, 2016

PUBLISH

In The Court of Appeals Seventh District of Texas at Amarillo

No. 07-12-00383-CR

STATE OF TEXAS, APPELLANT
V.
HAYDEN HUSE, APPELLEE

On Appeal from the County Court of Law No. 1
Lubbock County, Texas
Trial Court No. 2011-467345;
Honorable Mark Hocker, Presiding

March 6, 2014

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, State of Texas, appeals the trial court's order suppressing medical records of Appellee,

Hayden Huse, in a misdemeanor, driving while intoxicated case[1]

In support of its position that the trial court erred in suppressing those records, the State asserts: (1) Appellee lacked standing to challenge the grand jury subpoena by which the State obtained those records; (2) the trial court erroneously concluded the State unlawfully obtained Appellee's medical record because the State did comply with federal requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[2] (3) the trial court erroneously concluded Appellee's medical records should be suppressed under article 38.23 of the Texas Code of Criminal Procedure because those records were legally obtained; and (4) the trial court erroneously concluded Appellee's blood-alcohol test results were scientifically unreliable or irrelevant. We reverse and remand for further proceedings consistent with this opinion.

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[1] *See* TEX. PENAL CODE ANN. § 49.04 (West Supp. 2013).

[2] *See* Pub. L. No. 104-191, 110 Stat. 1936 (1996), codified as amended at 42 U.S.C. §§ 1320d-1320d-8 (West 2012). Specifically, the State asserts the disclosure of Appellee's medical records did not violate HIPAA's Privacy Rule. The United States Department of Health and Human Services promulgated the Privacy Rule under title 45 of the Code of Federal Regulations. *See* 45 C.F.R. pts. 160 & 164 (2013) (Privacy Rule).

BACKGROUND

On February 13, 2010, at approximately 2:00 a.m., Appellee failed to make a turn and drove his car into a dirt embankment before coming to stop in a cotton field. Lubbock County Sheriff deputies responded to the accident, and Appellee was transported to a hospital due to injuries he sustained in the accident. When Texas Department of Public Safety Trooper Troy McKee arrived to investigate, the deputies told him Appellee's breath smelled of an alcoholic beverage.

At approximately 5:15 a.m., Trooper McKee arrived at the hospital. He also noticed Appellee smelled of an alcoholic beverage and that his eyes were red, bloodshot, and watery. Trooper McKee was unable to administer any field sobriety tests due to Appellee's injuries. During their conversation, Appellee admitted that, prior to the accident, he drank six to seven beers between 7:30 and 11:30 p.m. at several local bars. Appellee also indicated his last drink was at 11:30 p.m. and he had nothing to drink since the accident. Based on this information coupled with Appellee's failure to negotiate the curve resulting in the accident, Trooper McKee believed Appellee was intoxicated when the accident occurred. He did not request a mandatory blood draw and Appellee refused to give a breath or blood

specimen. Hospital personnel had, however, drawn Appellee's blood for medical purposes at approximately 4:50 a.m.—two hours and fifty minutes after the accident.[3]

Based upon Trooper McKee's offense report, on March 30, 2010, a Lubbock Assistant County Criminal District Attorney filed an application for a subpoena seeking Appellee's medical records related to his injuries from the accident. At that time, no grand jury investigation concerning Appellee was pending. The next day, Appellee was charged by Complaint and Information in Cause No. 2010-460,173, with driving while intoxicated. Ultimately, Appellee's medical records were obtained as a result of the March 30 subpoena when, on April 15, 2010, a hospital business records affidavit, with Appellee's medical records attached, was delivered to the Criminal District Attorney's Office.

On December 15, 2010, Appellee filed a generic motion to suppress, seeking suppression of any evidence obtained as the result of "illegal acts on behalf of the State" committed on February 13, 2010, the date of the accident. That motion was subsequently amended

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[3] The results of Appellee's blood serum test by hospital personnel showed Appellee's blood alcohol content was 0.219. Other emergency room records indicate Appellee was diagnosed as suffering from acute alcohol intoxication.

on March 14, 2011, to specifically seek suppression of blood evidence "illegally" taken in violation of Appellee's rights under HIPPA, through the use of a "sham" grand jury subpoena. Before an order disposing of that motion was entered, the prosecution of Cause No. 2010-460,173 was dismissed on September 27, 2011, on the State's motion.

Eight days later, on October 5, 2011, a second application for a subpoena was filed, again seeking production of Appellee's medical records related to his injuries resulting from the accident. This time the application was signed by the foreman of the grand jury. That same day, the District Clerk issued a new "Grand Jury Subpoena." The next day, Appellee was again charged with driving while intoxicated—this time in Cause No. 2011-467,345—arising out of the same events of February 13, 2010. Shortly thereafter, on October 11, 2011, the hospital's business records affidavit and Appellee's medical records were again delivered to the Criminal District Attorney's Office.[4]

On January 25, 2012, a suppression hearing was held addressing the issues originally raised in the amended motion to suppress filed in Cause No. 2010-

[4] Appellee's medical records produced under the second grand jury subpoena were essentially the same as those produced under the first grand jury subpoena.

460,173. In addition to testimony of Trooper McKee, the facts surrounding the subpoena process and the obtaining of medical records were stipulated to between the State and Appellee, leaving only the issue of whether Appellee's medical records were illegally obtained and, therefore, excludable.

On August 6, 2012, the trial court granted Appellee's amended motion to suppress and on November 30, 2012, it filed its *Trial Court's Findings of Fact and Conclusions of Law*. In those *Findings* the trial court found, in pertinent part, that: (1) Appellee had standing to challenge the grand jury process by which the State obtained his medical records; (2) HIPAA creates an expectation of privacy in a person's medical information; (3) the first grand jury subpoena was defective; (4) medical records obtained pursuant to the first grand jury subpoena violated HIPAA; (5) the second grand jury subpoena did not cure the first subpoena's HIPAA violation;[5] (6) the State failed to demonstrate any attenuation of the taint arising from the first grand jury subpoena, (7) the State did not acquire Appellee's medical records via a warrant; (8) article 38.23 of the Texas Code of Criminal Procedure applies because the State

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[5] Appellee does not assert nor did the trial court conclude in its *Conclusions of Law* that the second grand jury subpoena was defective.

violated state and federal law through the use of the first subpoena; (9) the grand jury subpoenas used to obtain Appellee's HIPPA protected medical records were unlawful, (10) the doctrine of inevitable discovery is not available under Texas law; and (11) there is no scientifically reliable way to relate Appellee's medically tested serum blood-alcohol level back to a whole blood-alcohol level at the time of driving. This appeal followed.

DISCUSSION

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Ford v. State,* 158 S.W.3d 488, 493 (Tex. 2005). We do not engage in our own factual review, *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990), but give almost total deference to the trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Montanez v. State*, 195 S.W.3d 101, 108-09 (Tex. Crim. App. 2006). When the trial court makes explicit fact findings, we determine whether the evidence, when viewed in the light most favorable to

the trial court's ruling, supports those fact findings. *State v. Kelly*, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006). When the trial court's rulings are reasonably supported by the record and are correct under "any theory applicable to the case," an appellate court should affirm. *State v. White*, 306 S.W.3d 753, 757, n.10 (Tex. Crim. App. 2010). *See also Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex. Crim. App. 1988) (leading some legal analysts to refer to this rule as "the *Calloway* rule"). Accordingly, if the trial court's findings are supported by the record, we must affirm the decision if it is supported by our *de novo* review of the theories of law "applicable to the case." *Kelly*, 204 S.W.3d at 819.

MOTION TO SUPPRESS

A motion to suppress is a specialized objection regarding the admissibility of evidence. *Hall v. State*, 303 S.W.3d 336, 342 n.9 (Tex. App.—Amarillo 2009, pet. ref'd). *See Galitz v. State*, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981) (op. on reh'g). Such a motion is the proper remedy when evidence is illegally obtained in violation of a defendant's constitutional or statutory rights. *Hall,* 303 S.W.3d at 342 n.9 (citing *Wade v. State*, 814 S.W.2d 763, 764 (Tex. App.—Waco 1991, no pet.)). *See Reyes v. State*, 361 S.W.3d 222, 230 (Tex.

App.—Fort Worth 2012, pet. ref'd).[6] Only those acts which violate a person's privacy rights or property interests are subject to the state or federal exclusionary rule. *Miles v. State,* 241 S.W.3d 28, 36 n.33 (Tex. Crim. App. 2007). *See, e.g., Chavez v. State,* 9 S.W.3d 817, 822 (Tex. Crim. App. 2000) (Price, J., concurring) ("[U]nless someone's privacy or property interests are illegally infringed upon in the obtainment of evidence, the core rationale for providing this prophylactic measure is not met and its use is unwarranted.").

The mere filing of a motion to suppress does not impose on the State the initial burden of showing compliance with the law. *Wilkerson v. State*, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005). It is "settled law that the burden of proof is initially on the defendant to raise the exclusionary rule issue by producing evidence of a statutory violation, and that this burden then shifts to the State to prove compliance." *Pham v. State*, 175 S.W.3d 767, 772, 773 (Tex. Crim. App. 2005) ("We have long held that the burden of persuasion is properly and permanently placed upon the shoulders of the moving

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[6] As a procedural safeguard, a defendant has at least two opportunities to seek redress for any alleged violation of law by (1) filing a pretrial motion to suppress evidence or (2) objecting to the admission of the evidence at the time it is offered at trial and request a hearing outside the presence of the jury. *Hall,* 303 S.W.3d at 342.

party."). Before evidence is rendered inadmissible, the defendant must also show a causal connection between the violation and the evidence obtained. *Id.* at 773. If there is no causal relationship between the illegal conduct and the acquisition of the evidence, the evidence is not obtained in violation of the law. *Bell v. State*, 169 S.W.3d 384, 391 (Tex. App.—Fort Worth 2005, pet. ref'd) (citing *Gonzales v. State*, 67 S.W.3d 910, 912 (Tex. Crim. App. 2002)). After defendant establishes a violation of the law and produces evidence of a causal connection, the State may either disprove the causal connection or make an attenuation-of-taint argument. *See Wilson v. State*, 277 S.W.3d 446, 448 (Tex. App.—San Antonio 2008), *aff'd*, 311 S.W.3d 452 (Tex. Crim. App. 2010).[7]

"When a hearing on [a] motion to suppress is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing

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[7] If arguing attenuation-of-taint doctrine, the State must establish the taint of the illegality was so far removed from obtaining the evidence that the causal chain is broken. *Pham*, 175 S.W.3d at 773. When determining whether the taint of a violation of law was attenuated; the court considers the following four factors: (1) whether *Miranda* warnings were given; (2) the violation's temporal proximity; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Johnson v. State*, 871 S.W.2d 744, 751 (Tex. Crim. App. 1994).

affidavits, or upon oral testimony, subject to the discretion of the court." TEX. CODE CRIM. PROC. ANN. art. 28.01 § 1(6) (West 2006). A motion to suppress that is sworn to or supported by affidavit and admitted into evidence at the hearing may be considered as evidence. *See Gonzales v. State*, 977 S.W.2d 189, 190 (Tex. App.—Austin 1998, pet. ref'd) ("[M]otions to suppress [are] mere pleadings; they [are] not self-proving and they [are] not evidence."). *See also Bizzami v. State*, 492 S.W.2d 944, 946 (Tex. Crim. App. 1973) (allegations in a brief do not constitute proof).

For purposes of logical analysis, we will address issue one, pertaining to standing, first. We will then briefly address issues two and three together, before finally addressing issue four separately.

ISSUES ONE—STANDING

By its first issue the State asserts Appellee lacked standing to challenge the grand jury subpoena by which the State obtained Appellee's medical records because Appellee did not have a reasonable expectation of privacy in the blood-alcohol test results obtained by hospital personnel for medical purposes after the accident. Accordingly, the State contends the trial court erred in finding that he had standing to challenge the

grand jury subpoenas by which the State obtained his medical records because it erroneously rejected the holding of the Criminal Court of Appeals in *State v. Hardy*, 963 S.W.2d 516, 527 (Tex. Crim. App. 1997) and our holding in *Kennemur v. State*, 280 S.W.3d 305 (Tex. App.—Amarillo 2008, pet. ref'd), *cert. denied*, 556 U.S. 1191, 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2009).

In *Kennemur*, appellant asserted that his medical records resulting from emergency treatment at a hospital following a traffic accident caused by his intoxication were obtained in violation of HIPAA's Privacy Rule. *Id.* at 311. We held appellant lacked standing to challenge the State's use of his medical records at trial due to an alleged HIPAA violation under *Hardy* and stated the following:

> There is no Fourth Amendment reasonable expectation of privacy protecting blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident. *State v. Hardy*, 963 S.W.2d 516, 527 (Tex. Crim. App. 1997). The *Hardy* rule applies in instances where the accused challenges the State's use of his or her medical records at trial due to an alleged HIPAA violation. *See Murray v. State*, 245 S.W.3d 37, 42 (Tex. App.—Austin 2007, pet. filed); *Tapp v. State*, 108 S.W.3d 459, 461-62 (Tex. App.—Houston 2003, pet. ref'd). Because Appellant has no constitutional or statutory reasonable expectation

of privacy with respect to blood-alcohol test results obtained solely for medical purposes following an accident, he has no standing to complain that the State obtained his medical records in violation of HIPAA. *See Ramos v. State,* 124 S.W.3d 326, 338-39 (Tex. App.—Fort Worth 2003, pet. ref'd).

We are mindful that "standard, requirement or implementation specification" adopted under the Privacy Rule generally preempts contrary state laws. *Murray*, 245 S.W.3d at 42 (citing 45 C.F.R. § 160.203). Nevertheless we are constrained to follow existing law under *Hardy* absent any guidance or instructions to the contrary from the Court of Criminal Appeals. *Id.; Tapp*, 108 S.W.3d at 463. That said, HIPAA requirements for disclosure conform with the holding in *Hardy* as follows:

A covered health care provider providing emergency health care in response to a medical emergency . . . may disclose protected health care information to a law enforcement official if such disclosure appears necessary to alert law enforcement to: (A) The commission and nature of a crime; (B) The location of such crime or of the victim(s) of such crime; and (C) The identity, description, and location of the perpetrator of such crime. 45 C.F.R. § 164.512(f)(6)(i).

Kennemur, 280 S.W.3d at 311-12.

That appellant's medical records in *Kennemur* were obtained by the State via a *subpoena duces tecum* as opposed to a grand jury subpoena is of no moment. *See Tapp*, 108 S.W.3d at 462-63 (injured motorist lacked standing to complain that his blood-alcohol test results were not obtained in compliance with the grand jury subpoena process when his blood was drawn by emergency medical personnel for medical purposes after a traffic accident). *Accord Garcia v. State,* 95 S.W.3d 522, 526-27 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Dickerson v. State*, 965 S.W.2d 30, 31 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd, improvidently granted), 986 S.W.2d 618 (Tex. Crim. App. 1999); *Hicks v. State*, No. 01-02-00165-CR, 2003 Tex. App. LEXIS 9280, at *6 (Tex. App.—Houston [1st Dist.] Oct. 20, 2003, no pet.) (mem. op., not designated for publication); *Harmon v. State*, No. 01-02-00035-CR, 2003 Tex. App. LEXIS 6172, at *6-7 (Tex. App.—Houston [1st Dist.] July 17, 2003, no pet.) (mem. op., not designated for publication). This is particularly so where, as here, the State obtained the medical records by a grand jury subpoena following a prior allegedly defective grand jury subpoena. *See Ramos,* 124 S.W.3d at 338-39 (finding appellant lacked standing to assert medical records were inadmissible because the State

obtained the records by subpoena following a prior allegedly defective grand jury subpoena).

Thus, we hold that, because there is no expectation of privacy in one's blood-alcohol test results when the blood is obtained by hospital personnel after a traffic accident for medical purposes, Appellee lacks standing to assert that using a grand jury subpoena to obtain his blood results constituted an unreasonable search and seizure.[8] Because Appellee lacked standing to challenge the process by which his medical records were obtained, the trial court erred by addressing the question. Issue one is sustained.

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[8] Although, generally speaking, taking a blood sample is a search and seizure within the scope of the Fourth Amendment to the United States Constitution and article 1, section 9 of the Texas Constitution, *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *Aliff v. State*, 627 S.W.2d 166, 169 (Tex. Crim. App. 1982), Fourth Amendment search and seizure principles are not implicated here because the blood extraction did not involve police conduct. *State v. Kelly*, 166 S.W.3d 905, 910 (Tex. App.—Corpus Christi 2005), *aff'd*, 204 S.W.3d 808 (Tex. Crim. App. 2006). Accordingly, the absence of a search warrant or a court order are not theories of law applicable to the case before us. *See id.* at 911.

ISSUES TWO AND THREE—LEGALITY OF SEIZURE OF MEDICAL RECORDS

Even if we were to assume that Appellee had standing to challenge the process by which the first grand jury subpoena was issued, the trial court made no finding in its *Conclusions of Law* that the second grand jury subpoena was defective. Therefore, we must assume that the basis for the exclusion of Appellee's medical records was the State's failure to "demonstrate any attenuation of the taint" from the first subpoena.

By his motion to suppress, Appellee proffers two reasons why his medical records were illegally seized and should be suppressed: (1) the evidence was obtained in violation of his rights under HIPPA; and (2) the evidence was obtained through the use of a "sham" grand jury investigation.

The trial court's basis for finding the first grand jury subpoena defective was its conclusion that, because "no actual grand jury" was involved, the medical records were obtained in violation of HIPPA requirements because such records should only be released in response to a grand jury subpoena. In that regard, the trial court found that based on the "common and ac-

cepted practice" of the Lubbock County Criminal District Attorney's Office, grand jury subpoenas were regularly issued "independent of any grand jury or grand jury process" as a ruse to "illegally" obtain medical records under the guise of a grand jury investigation. In particular, the trial court condemned the practice of issuing a grand jury subpoena upon the application of an Assistant Criminal District Attorney rather than a grand jury member without reference to any pending investigation. While this practice may be the subject of another issue in another case, that practice is not the issue we must address in this case because the medical records produced in this case were produced in response to the second grand jury subpoena, which was itself issued upon the request of the foreman of the grand jury. We will not look beyond the issuance of the subpoena to determine whether the matter is a legitimate matter of consideration by the grand jury. Because disclosure of medical records under HIPAA is permissible without an individual's permission when the information is disclosed for law enforcement purposes and is obtained pursuant to a grand jury subpoena, the medical records in this case were not illegally obtained. *See* 45 C.F.R. § 164.512(f)(1)(ii)(B),

(f)(6)(i) (2013).[9] This exception to HIPAA's Privacy Rule is not qualified according to whether the grand jury subpoena is the first grand jury subpoena or a subsequent such subpoena.

The State further asserts it did not violate article 38.23 of the Texas Code of Criminal Procedure because the State's grand jury subpoenas were not defective and, even if the first subpoena was defective, the second was not. Because Appellee failed to establish any causal connection between issuance of the first and second subpoenas, and because the medical records in question were lawfully produced in response to the second subpoena, the trial court erred in finding the State did not comply with the requirements of HIPAA. Accordingly, the State's second and third issues are sustained.

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[9] Neither did Appellee prove a causal connection between the disclosure of his medical records by the hospital and any violation of a right to privacy at the hearing. *State v. Johnson,* 871 S.W.2d 744, 751 (Tex. Crim. App. 1994) ("The subsequent procurement of an arrest warrant was an intervening circumstance."). That said, the attenuation-of-taint doctrine is inapplicable here because Appellee has no standing to complain about the seizure of the evidence, i.e., no invasion of Appellee's right to privacy occurred when his medical records were seized from the hospital, a third party. *See Chavez v. State*, 9 S.W.3d 817, 819 (Tex. Crim. App. 2000) (citing *Fuller v. State*, 829 S.W.2d 191, 210-12 (Tex. Crim. App. 1992)).

ISSUE FOUR

By its fourth issue, the State asserts the trial court erroneously concluded Appellee's blood-alcohol test results were inadmissible because they were scientifically unreliable and irrelevant. We review a trial court's decision to admit or exclude evidence for abuse of discretion. *Page v. State*, 213 S.W.3d 332, 337 (Tex. Crim. App. 2006). "Appellate courts will uphold a trial court's ruling on admissibility of evidence as long as the trial court's ruling was at least within the zone of reasonable disagreement." *Id. See Hernandez v. State*, 205 S.W.3d 555, 558 (Tex. App.—Amarillo 2006, pet. ref'd).

Here, the trial court abused its discretion by holding that Appellee's medical records were inadmissible. Suppression of evidence is the proper remedy when evidence is *illegally* obtained in violation of the defendant's rights. *Hall*, 303 S.W.3d at 342 n.9 (citing *Wade v. State*, 814 S.W.2d 763, 764 (Tex. App.—Waco 1991, no pet.)); *Reyes*, 361 S.W.3d at 230. As stated above, Appellee's medical records were legally obtained. If Appellee's objection is to the admissibility of that evidence due to a lack of relevance or reliability, then the proper method of exclusion would be either a pretrial motion *in limine* or a trial objection when the evidence is offered. *Wade*, 814 S.W.2d at 764-65. *See*

State v. Robinson, 334 S.W.3d 77, 782 (Tex. Crim. App. 2011).[10]

Furthermore, in *State v. Esparza,* 413 S.W.3d 81 (Tex. Crim. App. 2013), the Court of Criminal Appeals dealt with the issue of whether the granting of a motion to suppress could be justified on appeal on the basis of grounds that were not raised in the lower court. The *Esparza* Court held a trial court's finding that breath-alcohol test results were inadmissible due to their lack of scientific reliability "was not a 'theory of law applicable to the case' that [was] available to justify the trial court's otherwise erroneous ruling on the [defendant's] motion to suppress" because that issue was never joined at the trial court level. *Id.* at 86. Where the State was not put on notice that the admissibility of the breath-alcohol test results were being questioned on the basis of their scientific reliability, Rule 702 of the Texas Rules of Evidence was not a "theory of law applicable to the case." *Id.*

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[10] "A motion in limine seeks to exclude objectionable matters from coming before the jury through a posed question, jury argument, or other means. *Wade,* 814 S.W.2d at 764. "In essence, a motion in limine's fundamental purpose is to obtain an order requiring an initial offer of objectionable evidence out of the jury's presence." *Id.* (citing M. Teague, B. Helft, 3 *Texas Criminal Practice Guide* § 73.02[2] (1990)).

By finding the evidence inadmissible because the State failed to come forward with evidence of its reliability and relevancy in the context of a pretrial suppression proceeding, the trial court impermissibly shifted the burden of production and persuasion from Appellee to the State.[11] Appellee produced *no* evidence concerning the scientific unreliability or irrelevancy of his blood-alcohol test.[12] In *Robinson,* the Criminal Court of Appeals stated as follows:

> Mr. Robinson contends that the State has the burden to show compliance with the state statute concerning the blood draw. Indeed it does—at trial. As the proponent of the evidence at trial, the State must fulfill all required evidentiary predicates and foundations. Thus, at trial, the State will be required to offer evidence that the blood was drawn by a qualified person before evidence of the blood, the blood test, and the blood test results are admissible.

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[11] Even if we were to cast the suppression motion as a motion *in limine*, the result would be the same.

[12] In addition, Appellee did not raise unreliability or irrelevancy as grounds for suppression in his original *DWI Motion To Suppress* or his *First Amended Motion to Suppress* filed March 14, 2011, or argue these grounds at the suppression hearing on January 25, 2012. Further, there were no preliminary matters raised by either party seven days before the hearing or good cause motion subsequent to the hearing. TEX. CODE CRIM. PROC. ANN. art. 28.01, § 2 (West 2006). *See Taylor v. State,* 850 S.W.2d 294, 295-96 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (op. on reh'g).

> Its burden at trial is to establish the admissibility of its evidence by a preponderance of the evidence. *See* TEX. R. EVID. 104(a).
> At a motion to suppress evidence, however, it is the burden of the movant (the person who opposes use of the evidence) to establish that the evidence should not be admitted because of unlawful conduct. *See State v. Kelly*, 204 S.W.3d 808, 819 & n.22 (Tex. Crim. App. 2006). And Mr. Robinsion failed to satisfy both his burden of production and his burden of persuasion.

Robinson, 334 S.W.3d at 782.[13] Thus, even if Appellee's evidentiary objections were somehow cognizable in the suppression proceedings, Appellee failed to satisfy both his burden of production and persuasion either by affidavit or oral testimony at the hearing.

Furthermore, Appellee reads too much into the statement by the Court of Criminal Appeals in *Bigon v. State* regarding proof of intoxication by retrograde extrapolation when it said, "research indicates that a blood test can be reliable if taken within two hours of driving." *Bigon v. State*, 252 S.W.3d 360, 368 (Tex.

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[13] "It is possible that a blood sample taken by someone who is not qualified may be determined to be unreliable, but this is a question of admissibility to be raised at trial rather than a pretrial suppression issue. Therefore, article 38.23 does not apply in this case." 334 S.W.3d at 782 (Meyers, J., and Price, J., dissenting). *See, e.g., Kennemur,* 280 S.W.3d at 309, 316-17 (blood serum test admissible at trial in the absence of any retrograde extrapolation analysis and despite that blood sample obtained seven hours after the accident).

Crim. App. 2008). Nowhere in *Bigon* does the Court hold, as a matter of law, that a blood test taken more than two hours after driving is unreliable or irrelevant in a driving while intoxicated case. *See, e.g., Kennemur*, 280 S.W.3d at 309, 316-17 (blood serum test admissible at trial to show intoxication in the absence of testimony regarding retrograde extrapolation despite the fact that the blood sample was obtained seven hours after accident).

This is not an instance where the State seeks to use a blood test obtained hours after an accident that was *below* the legal limit of intoxication and, through retrograde extrapolation, attempts to show Appellee's blood-alcohol level exceeded the legal limit at the time of the accident. Rather, the State eschews a retrograde extrapolation analysis in favor of establishing an inference at trial that, because Appellee exceeded the legal limit of alcohol consumption hours after the accident with nothing to drink between the time of the accident and the blood test, a jury may reasonably infer Appellee was intoxicated at the time of the accident. *Kennemur,* 280 S.W.3d at 316 (appellant's blood-alcohol results taken hours after the accident are probative of ap-

pellant's intoxication even in the absence of any retrograde extrapolation because, under an impairment theory, the State need not prove appellant's exact blood alcohol content at the time of the accident). Accordingly, scientific unreliability or irrelevance was not a theory of law applicable to the case for purposes of excluding Appellee's medical records. The State's fourth issue is sustained.

Conclusion

Because Appellee's medical records were not subject to exclusion under "any theory applicable to the case," the trial court's order granting Appellee's motion to suppress is reversed and the cause is remanded for proceedings in conformity with this opinion.

Patrick A. Pirtle
Justice

Do not publish.

Quinn, C.J. Concurring in the decision of the court and joining that portion of the opinion under which it is determined that Appellee lacked standing to contest the acquisition of the records.

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

NO. PD-0433-14

THE STATE OF TEXAS
v.
HAYDEN HUSE, Appellee

6/15/2016

On this day, the Appellee's motion for rehearing has been denied