No. 16-535

In The
Supreme Court of the United States

HAYDEN HUSE,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

MATTHEW D. POWELL
Lubbock County Criminal District Attorney

K. SUNSHINE STANEK
First Assistant District Attorney

JEFFREY S. FORD
Counsel of Record
Assistant Criminal District Attorney
LUBBOCK COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE
P.O. Box 10536
Lubbock, Texas 79408
(806) 775-1166
FAX (806) 775-7930
JFord@co.lubbock.tx.us

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

QUESTIONS PRESENTED

Petitioner's primary basis for requesting that certiorari be granted is his contention that there is a societally-recognized reasonable expectation of privacy in his medical records. The Texas Court of Criminal Appeals never addressed that contention, however, because that has never been the issue presented here. The TCCA instead made a narrow holding that Petitioner did not have a societally-recognized reasonable expectation of privacy in his blood-alcohol test results when those results were obtained for medical treatment purposes following a traffic accident, and that the State issued a lawful grand jury subpoena for purposes of the Health Insurance Portability and Accountability Act (HIPAA) "Privacy Rule." The questions presented here are:

1. 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?

2. 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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTRODUCTION

The Texas Court of Criminal Appeals (TCCA) determined that Petitioner did not have a reasonable expectation of privacy in his blood-alcohol test results when those results were obtained for medical treatment purposes following a traffic accident. The TCCA's ruling is a narrow one that focuses simply on blood-alcohol test results and does not purport to allow a prosecutor to obtain or peruse a person's medical records with unlimited discretion.

Petitioner has not presented this Court with a reason why it should hear the case. Justice Brennan once stated that discretionary review is based on the proposition that after decision at the trial court level and after at least one review at the state appellate court level,

> further appeal to the Supreme Court should be permitted only where issues of federal law important to the country were involved, or where further review was essential to resolve conflicts between lower courts on questions of federal constitutional or statutory law, which, by definition was to be equally and uniformly applicable in all parts of the country. "Absent these qualifications, one trial and one appellate review were enough."

See Justice Brennan, *Some thoughts on the Supreme Court's workload*, 66 JUDICATURE 230, 231 (1983). Further review is not essential to resolve conflicts amongst lower courts or to resolve a conflict between the lower court's opinion and this Court's Fourth Amendment

jurisprudence or the federal HIPAA statute. *See* SUP. CT. R. 10(b)-(c).

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner lost control of his vehicle during the night of February 13, 2010, crashing into a cotton field. Petitioner was taken to Covenant Medical Center in Lubbock, Texas, for treatment of his injuries. As part of Petitioner's medical treatment, the hospital drew his blood; an analysis of his blood revealed a blood-alcohol concentration of 0.219. Pet. App. 5a.

A Texas Department of Public Safety trooper met with Petitioner at the hospital approximately three hours after the accident. The trooper noticed that Petitioner was emitting an odor of alcohol and had other signs of alcohol ingestion. Petitioner admitted to having had six or seven beers the previous evening. Based on his investigation, the trooper believed that Petitioner was intoxicated at the time of the accident. *Id.*

Knowing that Petitioner's blood had been drawn as part of medical treatment, a Lubbock County Assistant Criminal District Attorney filed an application for a grand jury subpoena to obtain Petitioner's medical records – including the blood-alcohol lab work – from the February 13 accident. Covenant Medical Center complied with the grand jury subpoena by providing

Petitioner's medical records from the February 13 incident to the District Attorney's Office on April 15, 2010. Pet. App. 5a-6a.

B. PROCEDURAL HISTORY

The State charged Petitioner by information with the misdemeanor offense of driving while intoxicated on March 31, 2010. The case was dismissed on September 27, 2011. Pet. App. 6a-7a. Following dismissal of the case, the State charged Petitioner via another information with the misdemeanor offense of driving while intoxicated on October 6, 2011. Pet. App. 7a. The trial court, after concluding that the medical records were unlawfully obtained, granted the defense motion to suppress on August 6, 2012. Pet. App. 8a.

The State filed a notice of appeal challenging the trial court's suppression ruling. After determining that Petitioner's medical records were not subject to exclusion under any theory applicable to the case, the Seventh Court of Appeals of Texas reversed the trial court's suppression ruling on March 6, 2014. Pet. App. 37a-60a. The TCCA affirmed the judgment of the Seventh Court of Appeals on April 13, 2016. The TCCA held that there is no reasonable expectation of privacy in the blood-alcohol test results taken by hospital personnel solely for medical purposes after a traffic accident, and that there was no HIPAA violation by obtaining the medical records via a grand jury subpoena that was lawfully issued under Texas law. Pet.

App. 1a-36a. Petitioner's motion for rehearing was denied on June 15, 2016. Pet. App. 61a.

ARGUMENT

Petitioner argues that certiorari should be granted for four reasons: (1) state and federal courts are deeply divided on the issue; (2) the decisions of state and federal courts create tension with federal law and this Court's prior rulings; (3) the TCCA's decision was wrong because the search of Petitioner's medical records was not reasonable; and (4) HIPAA preempts Texas law. Pet. 7-28. The TCCA's correct rulings finding a lack of a societally-recognized reasonable expectation of privacy in blood-alcohol test results and that the HIPAA "Privacy Rule" was complied with when the blood-alcohol test results were turned over pursuant to a lawful grand jury subpoena does not warrant this Court's review.

I. Petitioner Has Not Shown a Jurisdictional Conflict or Conflict with This Court's Prior Decisions.

Petitioner argues that state and federal courts are deeply divided on the issue of the reasonable expectation of privacy in medical records and that the decisions of state and federal courts create tension with federal law and this Court's prior rulings. Petitioner has not shown a reason that certiorari should be

granted because: (1) a conflict with other state supreme courts or federal circuit courts of appeals regarding the narrow issue of the reasonable expectation of privacy in blood-alcohol test results has not been shown; and (2) the TCCA's narrow ruling is not in conflict with the HIPAA statute or relevant decisions from this Court.

A. Petitioner Has Not Shown a Conflict with Other State Supreme Courts or Federal Circuit Courts of Appeals.

The TCCA determined that the manner in which Petitioner's blood-alcohol test results were obtained did not violate the Fourth Amendment because Petitioner did not have a legitimate expectation of privacy in the blood-alcohol test results taken by hospital personnel solely for medical purposes after a traffic accident. Pet. App. 21a-23a. Petitioner claims that the TCCA's decision has "deepened the divide among state courts of last resort and federal courts of appeals on a fundamental Fourth Amendment issue." Pet. 7. He states that at least three state courts and four federal circuit courts of appeals have held that a warrantless intrusion into a person's medical records violates the Fourth Amendment, while five state courts and one federal circuit court of appeals have held the other way. *Id.* Petitioner's effort to create a conflict fails to account for the critical difference between the cases where a reasonable expectation of privacy was found and those where a reasonable expectation of privacy was not found. The critical difference is this: almost all of the

first set of cases deal with whether there is a reasonable expectation of privacy in medical records *in general* while almost all of the second set of cases deal with the narrower issue of whether there is a reasonable expectation of privacy in blood-alcohol test results when the testing is conducted for medical purposes following a traffic accident.

1. Cases where reasonable expectation of privacy was found.

Petitioner first argues that there is caselaw from state courts in Louisiana, Pennsylvania, and Ohio finding a reasonable expectation of privacy in medical records of a person suspected of committing a crime. Pet. 8-10. All of the state court cases cited by Petitioner are distinguishable from the instant case. In the Louisiana case, the Louisiana Supreme Court was focusing on a reasonable expectation of privacy in the defendant's "prescription and medical records" when it found that the defendant had a reasonable expectation of privacy. *State v. Skinner*, 10 So.3d 1212, 1218 (La. 2009). In the Pennsylvania case, the Pennsylvania Supreme Court expressly based its opinion regarding the release of the defendant's blood-alcohol test results upon the Pennsylvania Constitution, noting in its opinion that "[a] state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution." *Commonwealth v. Shaw*, 770 A.2d 295, 299 (2001). Finally, in the Ohio case, the Ohio Court of Appeals was focusing on the defendant's "medical records" when it found

that the defendant had a reasonable expectation of privacy. *State v. Little*, 23 N.E.3d 237, 250-251 (Ohio Ct. App. 2014).

Petitioner also argues that there is caselaw from the Second, Fourth, Seventh, Ninth, and Tenth Circuit Courts of Appeals that stand for the proposition that there is "some degree of a constitutional right to privacy in medical records." Pet. 10-14. Like the state court cases, all of the cases cited by Petitioner are distinguishable from the instant case. In the Tenth Circuit Court of Appeals case, the court considered the defendant's right to privacy in "pharmacy prescription records" when it concluded that the records fell within a protected "zone of privacy." *Douglas v. Dobbs*, 419 F.3d 1097, 1101-1102 (10th Cir. 2005). In the Fourth Circuit Court of Appeals case, the court considered the patient's reasonable expectation of privacy in his "treatment records and files maintained by a substance abuse treatment center" when it concluded that the patient's expectation of privacy was one that society is willing to recognize as objectively reasonable. *Doe v. Broderick*, 225 F.3d 440, 450-451 (4th Cir. 2000). In the Second Circuit Court of Appeals case, the court considered the release of details of an agreement which revealed the plaintiff's HIV status when it concluded that "the right to confidentiality includes the right to protection regarding information about the state of one's health." *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994). In the Seventh Circuit Court of Appeals case, the court considered whether the defendants had violated the plaintiff's constitutional right to privacy

by revealing his AIDS status when the court concluded that there is 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, in the Ninth Circuit Court of Appeals case, the court considered a statutory scheme that allowed for the warrantless disclosure of patient's medical records at abortion clinics when it concluded that individuals have a constitutionally protected interest in avoiding disclosure of personal matters, including "medical information." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 549-551 (9th Cir. 2004).

None of these cases establish a conflict with the TCCA's decision. Each case deals with the reasonable expectation of privacy in medical and/or prescription records/information in general or relies upon state constitutional provisions as opposed to the U.S. Constitution. None of the cases considered whether there is a reasonable expectation of privacy in blood-alcohol test results under the Fourth Amendment, so none can establish a conflict on that point.

2. Cases where reasonable expectation of privacy was not found.

Petitioner cites five state court cases and one federal circuit court of appeals case holding that a warrantless intrusion into medical records does not violate the Fourth Amendment. Pet. 14-16. Unlike the cases discussed in the preceding section, all of the state court cases deal with the issue actually decided by the TCCA

– the narrow issue of the reasonable expectation of privacy in blood-alcohol test results when the results were obtained pursuant to testing for medical purposes. As for the federal circuit court of appeals case cited by Petitioner, that case has no application to the present case for several reasons, including the fact that it does not address the issue of the reasonable expectation of privacy in blood-alcohol test results.

The Michigan, New Hampshire, Indiana, Alabama, and Delaware cases all stand for the proposition that society is not willing to consider reasonable an expectation of privacy in blood-alcohol test results. In the Michigan case, the Michigan Supreme Court determined that the acquisition of the defendant's blood-alcohol test results did not violate the defendant's Fourth Amendment rights because "an expectation of privacy in blood alcohol test results . . . is [not] one which society is willing to consider reasonable." *People v. Perlos*, 462 N.W.2d 310, 319 (1990).[1] In the New Hampshire case, the New Hampshire Supreme Court concluded that the request for and acquisition of the defendant's blood-alcohol test results without a search warrant does not implicate the U.S. or New Hampshire Constitutions because any subjective expectation of privacy in the blood-alcohol test results "is not one which society considers reasonable." *State v. Davis*, 12

[1] The *Perlos* court stated that it was not holding that "unrestricted access to medical records is outside the scope of Fourth Amendment protection. Rather, we hold that defendants do not have a protected Fourth Amendment interest in blood alcohol test results under the circumstances presented by these cases." *Perlos*, 462 N.W.2d at 321.

A.3d 1271, 1274, 1277 (2010). In the Indiana case, the Indiana Court of Appeals concluded that the defendant did not have a reasonable expectation of privacy in the blood-alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient. *State v. Eichhorst*, 879 N.E.2d 1144, 1149-1150 (Ind. Ct. App. 2008). In the Alabama case, the Alabama Court of Criminal Appeals determined that the defendant's Fourth Amendment rights were not violated from the State's acquisition of the blood-alcohol test results because the defendant did not have a reasonable expectation of privacy in his blood-alcohol test results taken by the hospital as part of its consensual treatment of the suspect. *Tims v. State*, 711 So.2d 1118, 1122-1124 (Ala. Crim. App. 1997). Finally, in the Delaware case, the Delaware Superior Court held that "whatever 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." *State v. Hartmetz*, No. 1510007362, 2016 WL 3752564 at *5 (Del. Super. Ct. July 6, 2016) (*unpublished op.*).

Petitioner also cites a case from the Sixth Circuit Court of Appeals where a reasonable expectation of privacy in medical records was not found to exist. The Sixth Circuit Court of Appeals held that disclosure of medical records unrelated to a criminal investigation did 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). The *Jarvis* case, however, has no application to the present case for several reasons. First, it was an appeal from the denial of qualified immunity in a § 1983 lawsuit against prison officials. While the court considered whether the plaintiff's privacy interests were violated from unauthorized disclosure of medical records, the court was never tasked with determining if the plaintiff's Fourth Amendment rights had been violated. *Id.* at 125-126. Second, the *Jarvis* case is a single outlier opinion that conflicts with the majority of the federal circuit courts of appeals, which have concluded that the constitutional right to privacy extends to medical and/or prescription records. *See Skinner*, 10 So.3d at 1217. Finally, unlike the state court cases cited above, the *Jarvis* case has no application here because it was never asked to consider the societal expectation of privacy in blood-alcohol test results – the narrow issue present here.

B. Petitioner Has Not Shown a Conflict with HIPAA or This Court's Prior Rulings.

The Fourth Amendment of the U.S. Constitution states that

> [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, 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.

U.S. CONST. amend. IV. A search occurs when the government violates a subjective expectation of privacy that society recognizes as "reasonable" or "legitimate." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (*citing Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *see also United States v. Jones*, 132 S.Ct. 945, 949-951 (2012) (predicating Fourth Amendment standing on either an intrusion-upon-property theory or a reasonable-expectation-of-privacy theory). Legitimization of expectations of privacy must have a source outside of the Fourth Amendment, "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Jones*, 132 S.Ct. at 951. In determining whether an expectation of privacy is viewed as reasonable by "society," the proper focus is upon American society as a whole, rather than a particular state. *California v. Greenwood*, 486 U.S. 35, 43-44 (1988).

Petitioner argues that "[c]ourts 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." In support of that proposition, Petitioner cites several cases from this Court, as well as the HIPAA "Privacy Rule." Pet. 17-21. But, neither the cases cited by Petitioner nor the HIPAA "Privacy Rule" show any conflict with the narrow holding of the TCCA in this case.

First, Petitioner cites *Whalen v. Roe* for the proposition that a person has a constitutionally protected interest in avoiding "disclosure of personal matters," *see Whalen v. Roe*, 429 U.S. 589, 598-599 (1977), but that does not address the narrow issue addressed here regarding the release of blood-alcohol test results as opposed to medical information in general.

Second, Petitioner cites *Ferguson v. City of Charleston* for the proposition that a person has a reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital, *see Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001), but that statement cannot be considered in isolation, but rather must be considered in context with the policy at issue in the case. At issue was a policy under which staff at a Charleston public hospital performed a diagnostic test of patients receiving prenatal treatment that met certain criteria. If a woman tested positive for cocaine either during pregnancy or after labor, she would be given an opportunity to get substance abuse treatment. The policy added the threat of law enforcement intervention to make the policy effective. *Id.* at 70-73. The Court found that the Fourth Amendment prohibited the policy at issue because, "[g]iven the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of 'special needs.'" *Id.* at 84. The Court also noted that the issue was that the drug

testing was conducted "for the specific purpose of incriminating those patients." *Id.* at 85. Unlike the *Ferguson* case, Covenant Medical Center was not acting as an agent of law enforcement in taking or testing Petitioner's blood sample or in producing the results of the testing to law enforcement. There was no policy between Covenant Medical Center and law enforcement here either to conduct blood-alcohol testing or that the testing would be produced to law enforcement. Rather, the blood-alcohol testing was conducted as a legitimate aspect of medical treatment. The only possible government search or seizure at issue here is the after-the-fact obtaining of the test results.

Finally, Petitioner cites *Missouri v. McNeely* for the proposition that the Court refused to allow warrantless searches even though the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal, *see Missouri v. McNeely*, 133 S.Ct. 1552, 1564 (2013), but the issue in *McNeely* was whether the natural dissipation of alcohol in the bloodstream constitutes a per se exigency justifying a blood draw without a warrant or consent in all drunk-driving cases – which it does not. *Id.* at 1556. The reasonable expectation of privacy in *McNeely* is obvious: the "compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation" implicates an individual's "most personal and deep-rooted expectations of privacy." *Id.* at 1558. *McNeely* is simply inapplicable here because it does not deal with the narrow issue presented in this case.

Petitioner also argues that Congress has recognized a reasonable degree of privacy in medical records via implementation of the HIPAA "Privacy Rule." While protection of medical privacy interests is obviously one of the reasons underscoring the passage of HIPAA, *see* Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82462, 82469 (Dec. 28, 2000), the enactment of HIPAA did not give rise to either a physician-patient or medical records privilege, nor did it confer privacy rights upon a specific class of individuals or support a private right of action. *See, e.g.*, *United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007); *Acara v. Banks*, 470 F.3d 569, 571-572 (5th Cir. 2006). Furthermore, and more importantly, the legitimate expectation of privacy in medical records *in general* is not – and has never been – the issue here. The TCCA expressly acknowledged the distinction between a reasonable expectation of privacy in medical records *in general* and the narrower issue of a reasonable expectation of privacy in blood-alcohol test results when it stated that "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." Pet. App. 23a. Thus, regardless of the "great degree of privacy" placed in medical records in general, *see* Pet. 18-19, Petitioner has not shown a valid reason upon which certiorari should be granted because he has not shown either a conflict amongst the lower courts or a conflict between

HIPAA and relevant decisions of this Court and the narrow holding of the TCCA in this case.

II. The TCCA Correctly Applied This Court's Fourth Amendment Precedent and the HIPAA "Privacy Rule."

Petitioner argues that the TCCA's decision was erroneous because the search of Petitioner's medical records was not reasonable and because the HIPAA statute preempts Texas law. Petitioner has not shown a reason that certiorari should be granted because: (1) the TCCA correctly applied this Court's Fourth Amendment precedent; and (2) the TCCA's decision is consistent with HIPAA.

A. The TCCA Correctly Applied This Court's Fourth Amendment Precedent.

The ultimate measure of the constitutionality of a governmental search under the Fourth Amendment is "reasonableness." *Maryland v. King*, 133 S.Ct. 1958, 1969 (2013). A search must be reasonable in its scope and manner of execution. *Id.* at 1970. Petitioner argues that the TCCA's decision was wrong because the search of his medical records was not reasonable due to the lack of a search warrant used to obtain the medical records. Pet. 21-22.

The blood-alcohol test results were obtained pursuant to a grand jury subpoena (which, as discussed further below, was lawfully issued under Texas state law). The "law enforcement exception" of 45 C.F.R.

§ 164.512(f) (which is contained within the regulations regarding the privacy of individually identifiable health information in Title 45, Part 164, Subpart E of the Code of Federal Regulations) expressly permits disclosure of "protected health information for a law enforcement purpose to a law enforcement official" pursuant to a grand jury subpoena. *See* 45 C.F.R. § 164.512(f)(1)(ii)(B).

The Court has stated that "[t]he grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment." *United States v. Calandra*, 414 U.S. 338, 346 (1974). As shown above, the TCCA correctly applied this Court's Fourth Amendment precedent when it determined that Petitioner lacked a legitimate expectation of privacy in the blood-alcohol test results taken from the February 13, 2010, medical blood draw. Pet. App. 14a-23a. Additionally, even if Petitioner has standing to challenge the manner in which the blood-alcohol test results were obtained, the manner in which the blood-alcohol content was obtained was reasonable because Covenant Medical Center's disclosure was made pursuant to the "grand jury subpoena" provision of the "law enforcement exception." The grand jury subpoena provision expressly permitted Covenant Medical Center to disclose Petitioner's medical records. And, the grand jury subpoena was not too sweeping in its terms because Petitioner's blood-alcohol test results contained in his

medical records was undeniably relevant in determining whether Petitioner was intoxicated at the time of the accident. Furthermore, the grand jury subpoena was limited to requesting the medical records from February 13, 2010, and did not authorize "perusing through a man's 'entire medical records.' "[2]

B. The TCCA's Decision is Consistent with HIPAA; Therefore, HIPAA Does Not Preempt Texas Law.

HIPAA provides for federal preemption of any contrary state law. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, tit. II, § 262(a), 110 Stat. 2030, *codified at* 42 U.S.C. § 1320d-7(a)(1) (" . . . a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1172 through 1174 [codified as 42 U.S.C. §§ 1320d-1 to 1320d-3], shall supersede any contrary provision of State law . . . "). The Code of Federal Regulations further expounds upon the HIPAA preemption requirement. *See* Title 45, Part 160, Subpart B (45 C.F.R. §§ 160.201-160.205). "A standard, requirement, or implementation specification adopted under [Subchapter C] 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 Subchapter C (which contains the

[2] *See* Pet. 21.

privacy of individually identifiable health information regulations), 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.

45 C.F.R. § 160.202 ("Contrary").

Petitioner argues that the TCCA's opinion evinces two ways in which Texas state law is contrary to HIPAA. First, he argues that Texas allows a prosecutor to "act as both prosecutor and one-man grand jury," which he argues is contrary to HIPAA's disclosure provisions. Pet. 23. Second, he argues that the TCCA's ruling 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." *Id.* Neither of Petitioner's arguments show that the TCCA's opinion is contrary to a provision of HIPAA or the federal regulations that implemented the HIPAA provisions.

1. The State did not use a "sham grand jury subpoena" in this case.

Petitioner argues that the State obtained his medical records via a "sham grand jury subpoena," while the HIPAA permissive disclosure provisions contemplate only a "true grand jury subpoena." He argues that having a prosecutor sign a grand jury subpoena is a "deceptive artifice designed to circumvent the protections of a magistrate or an actual grand jury." Pet. 23-26.

The HIPAA "Privacy Rule" allows "protected health information" to be released in compliance with and as limited by the relevant requirement of a "grand jury subpoena." 45 C.F.R. § 164.512(f)(1)(ii)(B); *see also* 65 Fed. Reg. at 82531 (noting in the HIPAA "Final Rule" that disclosures are permitted "pursuant to a state or federal grand jury subpoena."). This permissive disclosure provision allows a covered entity to disclose protected health information, such as medical records, in order to comply with a state or federal grand jury subpoena. Noticeably, however, neither the federal regulation itself nor the HIPAA "Final Rule" requires or dictates any additional procedures, requirements, or limitations on the normal grand jury function or on the requirements for a valid grand jury subpoena under state law. Thus, what constitutes a state "grand jury subpoena" is determined based on state law without any additional procedures or requirements imposed by HIPAA or the "Privacy Rule."

The State did not use a "sham grand jury subpoena" to obtain Petitioner's medical records here. The TCCA determined that the State acquired Petitioner's medical records via a grand jury subpoena that complied with Texas state law. Pet. App. 27a-36a. It noted within its discussion that a Texas prosecutor may issue a subpoena on the grand jury's behalf under the authority of TEX. CODE CRIM. PROC. ANN. arts. 20.10 & 20.11, as long as the subpoena is not being used as a subterfuge to obtain an investigative interview in the prosecutor's office or for the purpose of preparing an already pending indictment for trial. Pet. App. 28a-32a; *see also* 1 GRAND JURY LAW AND PRACTICE § 6.2 (2d ed. Nov. 2016) (noting that the role of the prosecutor and the grand jurors in subpoenaing evidence varies from jurisdiction to jurisdiction, with "about a third of the states," including Texas, allowing for grand jury subpoenas to be issued "at the request of either the prosecutor or the grand jury"). Petitioner, however, argues that the TCCA's reasoning is "repugnant to the plain language of HIPAA." Pet. 25. But, Petitioner has not explained how a grand jury subpoena that was validly issued under Texas state law is "repugnant to the plain language of HIPAA" – especially since Petitioner has not shown that the prosecutor abused the grand jury's ordinary investigative function.

2. Texas law is not "contrary" to HIPAA provisions regarding the disclosure of medical records to law enforcement officials.

Petitioner argues that the TCCA's ruling is contrary to HIPAA because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of HIPAA. Pet. 26-27. He argues that the TCCA's ruling is contrary to HIPAA because it "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." Pet. 27.

HIPAA and the "Privacy Rule" do not create an absolute right to the protection of medical records from disclosure without consent, recognizing that a patient's right to privacy must be balanced with the needs of society. 65 Fed. Reg. at 82464. The HIPAA "Final Rule" specifically states that "[e]xcept for laws that are specifically exempted by the HIPAA statute, state laws continue to be enforceable, unless they are contrary to Part C of Title XI of the standards, requirements, or implementation specifications adopted or pursuant to subpart x" and that state laws are only preempted "when there is a direct conflict between state laws and the regulation, and where the regulation provides more stringent privacy protection than state law." 65 Fed. Reg. at 82797-82798.

None of the standards, requirements, or implementations in HIPAA's "Privacy Rule" are contrary to

the TCCA's ruling since it does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Part C of Title XI of the Social Security Act (codified at 42 U.S.C. §§ 1320d-1320d-9). As detailed in the preceding section, Petitioner's medical records were properly disclosed pursuant to the grand jury subpoena exception. Petitioner argues that the TCCA's ruling conflicts with the "Privacy Rule" because it "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." Pet. 28. Petitioner's authority for that proposition is Section 164.512(f)(2)(ii), which prohibits disclosure of "any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue" for the purposes of identification or location. *See* 45 C.F.R. § 164.512(f)(2)(ii). The medical records here were not turned over pursuant to the Section 164.512(f)(2) "identification and location" provision, however; thus, that prohibition does not apply here since the disclosure was made pursuant to the grand jury subpoena exception of Section 164.512(f)(1)(ii)(B).

In light of the lack of an "absolute right" to the protection of medical records from disclosure without consent and due to the permissive disclosure provisions of 45 C.F.R. § 164.512(f), it cannot be said that the TCCA's ruling stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Part C of Title XI of the Social Security Act.

III. Petitioner Exaggerates the Consequences of the TCCA's Decision.

To create the impression of an Orwellian police state, Petitioner repeatedly suggests that if the TCCA's decision is allowed to stand, prosecutors will have unlimited discretion to invade a person's medical privacy at will. *See, e.g.*, Pet. 18, 21, 22, 27. Contrary to his prediction, the TCCA's decision is not a catch-all holding allowing for unfettered access to all of a suspect's medical records without limitation or oversight, nor does it abrogate federal and state courts' recognition of a reasonable expectation of privacy in medical records in general. In fact, the TCCA acknowledged 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." The TCCA then went on to say that "that broader issue is not before us here." Pet. App. 21a.

The issue was not – and is not – whether society recognizes a reasonable expectation of privacy in medical records *in general*; the issue is the much more specific and narrow issue of whether there is a reasonable expectation of privacy in blood-alcohol test results obtained after an accident solely for medical purposes. The TCCA expressly limited its consideration to the propriety of the Seventh Court of Appeals' holding that Petitioner lacked a reasonable expectation of privacy in the blood-alcohol test results; it did not reverse or otherwise address the propriety of the trial court's decision to suppress the remainder of Petitioner's medical records. *See* Pet. App. 16a, 16a n. 6. There is no

reason to believe that the TCCA's decision will lead to unconstitutional invasions of a societally-recognized reasonable expectation of privacy in the future. Were prosecutors to abuse the grand jury subpoena process, traditional remedies would be and still are available to a trial court judge – including quashing subpoenas or suppressing any evidence obtained as a result of an overbroad subpoena.

Petitioner's hyperbole aside, he has not shown a reason upon which certiorari should be granted. He has not shown a conflict of authority for this Court to resolve, nor has he shown that the TCCA misconstrued or misapplied this Court's Fourth Amendment precedent or provisions of the HIPAA "Privacy Rule."

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

MATTHEW D. POWELL
Lubbock County Criminal
District Attorney

K. SUNSHINE STANEK
First Assistant
District Attorney

JEFFREY S. FORD
Counsel of Record
Assistant Criminal
District Attorney
LUBBOCK COUNTY CRIMINAL
DISTRICT ATTORNEY'S OFFICE
P.O. Box 10536
Lubbock, Texas 79408
(806) 775-1166
FAX (806) 775-7930
JFord@co.lubbock.tx.us

January 11, 2017