No. 16-535

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

PETITIONER'S REPLY BRIEF

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Because the Texas Court of Criminal Appeals has minimized the Fourth Amendment and HIPAA, a government actor can secretly subpoena a citizen's medical records, without any oversight or notice. Not for something specifically in those records, such as blood alcohol test results. No – a prosecutor can unilaterally subpoena a person's entire medical record and pore over them, and the person would neither know about nor have the preemptive ability to challenge that subpoena.

In the case below, the Texas Court of Criminal Appeals approved a prosecutor's subpoena 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/DOB 12-06-1981 for date of service of February 13, 2010 **and any dates thereafter** pertaining to original date." The prosecutor then dug through hundreds of pages of Mr. Huse's private medical records until he found something upon which he could base criminal charges.

A. By Focusing on the Details of What Forms Inculpatory Evidence May Take, the State Obfuscates the Real Issue of Whether Warrantless Intrusion Into a Person's Medical Records Survives the Fourth Amendment and HIPAA and the Significant Divide Between Courts on the Issue

Every first-year law student understands that if the police enter a house uninvited without a warrant

or exigent circumstances they have violated the Fourth Amendment. Consequently, if they find contraband anywhere in the house, the State cannot rely upon that discovery to bring criminal charges against the homeowner. The police searching the home may strongly suspect the owner is hiding contraband in the bedroom. The bedroom may be the only room they search and in fact may be the location where they eventually discover contraband. Along the same line, in one case the contraband may be drugs; perhaps stolen goods or illegal weapons in another. Ultimately, the particular room searched and the contraband discovered is irrelevant to the only question concerning a court: did police violate the Fourth Amendment by entering the citizen's home without a warrant or exigent circumstances.

Medical records contain a variety of reports from different sources. Perhaps even more so than a house, medical records are uniquely rich in information about a person. Such records may contain information such as whether the patient is undergoing treatment for cancer, a genetic disorder, or any other disease; what prescription medications he takes; what physical or mental illnesses he may have. The medical records may also contain lab reports revealing inculpatory blood alcohol test or drug test results. The doctor's notes or prescriptions issued may indicate a drug addiction. Other tests or notes may contain details of illegal medical treatments such as late-term abortion indicators or illegal organ transplants.

All this information – the innocent and the potentially criminal – is exposed to review by a government actor when he obtains a person's medical records via a secret subpoena. A person's deeply personal information is laid bare before the government agent as he peruses the medical records looking for something upon which to bring criminal charges.

In this review, as in the instant case, a prosecutor may discover inculpatory test results in a single line of a lab report. In other cases, different inculpatory evidence may be in different locations of the records. What the prosecutor finds and where he finds it, however, is irrelevant. The only question is whether the prosecutor's intrusion into the medical records violates the Fourth Amendment and HIPAA.

In its Brief in Opposition, the State of Texas contends this is not a case dealing with medical records in general. It avers this case only implicates one line out of hundreds of pages – that revealing Mr. Huse's blood alcohol content at the time of treatment. This is the first time since the case's inception the State of Texas has employed such narrow focus. When it subpoenaed Mr. Huse's medical records, the State of Texas did not only seek the results of blood alcohol testing. It chose instead to request "all medical records" related to the incident both on the initial day Mr. Huse visited the hospital "and any dates thereafter." The prosecutor's subpoena was not narrowly drawn, and the Texas Court of Criminal Appeals gave the subpoena wholesale approval. There is no limitation on future

subpoenas likewise ordering the production of a person's full medical records.

Moreover, the State of Texas attempts to minimize how significantly and deeply divided the state high courts and the federal circuit courts are on this issue by parsing out the forms the inculpatory medical record evidence may take. The state is obfuscating the issue. It matters not whether the inculpatory evidence is that of doctor shopping, prescription tampering, drug addiction, or blood alcohol levels.[1] In every case, as in the case at bar, a government actor obtained inculpatory evidence from a citizen's medical records without going through the protections of a judicial entity, either by a warrant in consideration of the Fourth Amendment or a subpoena issued by the grand jury via correct HIPAA procedures.

The details of each case may change, but the issue remains: can the state "enter" a citizen's medical records without a warrant and then bring criminal charges against that citizen based upon cherry-picked information found in those records. And, as detailed in the Petition for Writ of Certiorari, the country's state high courts and federal circuit courts are deeply

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[1] *See State v. Skinner*, 10 So.3d 1212 (La. 2009) (finding the Fourth Amendment was implicated in the search of medical records in a doctor shopping case); *Douglas v. Dobbs*, 419 F.3d 1097 (10th Cir. 2005) (finding the Fourth Amendment was implicated in the search of prescription records in a prescription tampering case); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000) (finding the Fourth Amendment was implicated in the search of medical records in a drug abuse case).

divided on this issue. All courts, law enforcement officers, and attorneys litigating these cases desperately need this Court's resolution and guidance.

B. The Texas Court of Criminal Appeals Has Created Tension Within Its Own Court on What Areas Garner a Reasonable Expectation of Privacy

The Petition for Writ of Certiorari sets forth how the decision of the court below creates tension with federal law and this Court's prior rulings. Petitioner stands by those assertions. Additionally, after the instant Petition was filed, the Texas Court of Criminal Appeals issued an opinion that is difficult to reconcile with its conclusion in the case below.

On December 7, 2016, the Texas Court of Criminal Appeals discussed the privacy of text messages held on a cell phone. *Love v. State*, ___ S.W.3d ___, No. AP-77,024, 2016 WL 7131259, at *4 (Tex. Crim. App. Dec. 7, 2016). The court distinguished between non-content and content information disclosed through third party phone carriers. *Id.* The court acknowledged society's recognition of a privacy interest in text messages. *Id.* at *6. It concluded a person has "a reasonable expectation of privacy in the contents of text messages he sent." *Id.*

It is difficult to reconcile how the same court (in opinions authored by the same judge) can give Fourth Amendment protection to information contained in text messages and yet refuse such protections for

information contained within medical records. This incongruity in opinions reveals a potential misunderstanding about areas where society has recognized a reasonable expectation of privacy. It also reflects a willingness to selectively choose which federal laws apply in Texas, as the court below disregarded HIPAA and yet afforded protection to information it recognized as potentially covered by the Stored Communications Act.

C. The Opinion of the Court Below Violates the Plain Meaning of HIPAA

Part of HIPAA seeks to balance a person's privacy in his medical records with legitimate government interests in obtaining those records. To this end, and as detailed in the Petition, HIPAA permits disclosure of medical records to a prosecutor *if* the prosecutor first obtains a grand jury subpoena. *See* 45 C.F.R. §§ 164.103, 164.512(f)(1)(ii). HIPAA's plain language undeniably contemplates a system whereby a prosecutor is not the one issuing a grand jury subpoena. Otherwise, HIPAA would mandate the prosecutor obtain a document (the "grand jury" subpoena) he himself can generate. That requirement does not make sense.

What does make sense is that Congress actually contemplated a grand jury would be the only entity capable of issuing a subpoena. After all, a "Grand Jury Subpoena" is typically not unilaterally issued by the prosecutor without convening, consulting, alerting, or including the grand jury in any capacity in issuing the

subpoena. Texas's unique law, however, permits prosecutor "grand jury" subpoenas, which are outside the bounds of regular grand jury practice. While these subpoenas are an anomaly in traditional grand jury practice, they are routinely utilized by Texas prosecutors. In fact, the use of these prosecutor-issued "grand jury" subpoenas is so common they are well-known in the Texas criminal defense field by their nickname: sham subpoenas.

This unique Texas grand jury law frustrates HIPAA's purpose of protecting a citizen's medical records. It disregards the value HIPAA places in a review by a neutral magistrate. It violates HIPAA's Preemption Clause.

D. Contrary to the State's Assertion, There is No Way to Check the Prosecutor's Use of Sham Grand Jury Subpoenas

These prosecutor-issued "grand jury" subpoenas are a frightening and unchecked power in a prosecutor's toolbox. Because these subpoenas are issued under the authority of the grand jury, they are made wholly secret by Texas law. *See* TEX. CODE CRIM. PROC. ANN. art. 20.02(a) ("The proceedings of the grand jury shall be secret"). *Once criminal charges are brought*, a defendant may petition the court to order the disclosure of the subpoena. *Id.* art. 20.02(d). Otherwise, the subpoena remains secret.

In this very case, Petitioner was aware of the subpoena only after he filed a Motion to Disclose Grand

Jury Subpoena. Before its issuance and execution, Petitioner had no power to know of the subpoena's existence. When the prosecutor obtained and perused hundreds of pages of his medical records, Petitioner had no notice they were going to do so. He did not know a government actor looking for grounds to bring criminal charges had sifted through his medical records until several months after the fact – long after criminal charges were already brought.

The State of Texas urges this Court to rely upon the traditional remedy of quashing subpoenas, here ones by abusive prosecutors. By the opinion of the court below and the Texas Code of Criminal Procedure, however, quashing these sham subpoenas is not possible. One cannot move to quash a subpoena he is, by law, prevented from discovering.

Moreover, because the sham subpoena is issued in secret, the citizen cannot object to it. And because it is issued as a seemingly valid grand jury subpoena, i.e., on a document titled "Grand Jury Subpoena" with a caption of "*In the Matter of Grand Jury Investigation*," the medical entity subject to the subpoena has little grounds for questioning its validity. *See City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443, 2452, 192 L.Ed.2d 435 (2015) (noting "absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker").

Simply put, unless this Court holds otherwise, there are no remedies, limitations, oversights, or protections from an overreaching, abusive use of the sham subpoena power in the state's search and seizure of citizens' medical records. The state characterizes this as an exaggeration of the consequences. Petitioner is simply discussing the ongoing practice in Texas, now legitimized by the opinion below. There is no exaggeration. The law is what it is until it was what it was. Unfortunately, current law is just as bad as it sounds.

Since the opinion below was issued, a police officer need not bother with a warrant; he can just have the prosecutor subpoena, in secret, a suspect's complete medical records. This circumvention saves the officer the time and hassle of completing an affidavit and submitting it to a neutral magistrate who may limit the scope of the information to be disclosed or even deny the search altogether. This again is no exaggeration. It is a recognition of the obvious. An officer will not bother with paperwork or a magistrate if he is not required by law to do so.

The Framers of the Constitution perceived "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). They separated out the powers, so the same people exercising the power of one branch are subject to the oversight of the others. Otherwise, the possibility for abuse of authority is intolerably high.

By very intentional design, the Founders created the Judicial Branch to reign in the ambitions of the Executive Branch. One consequence of this design is, generally any intrusion into an area of a citizen's life protected by the Constitution or by statute must first gain approval by a neutral entity of the judicial branch, i.e., a magistrate or grand jury. If a police officer or prosecutor (both members of the Executive Branch) seek to obtain entry into an area of a citizen's life, he must obtain a warrant or grand jury subpoena. Furthermore, the neutrality of those entities wins them certain powers, such as the subpoena power and the power to review evidence in secret.

The law created in this case by the Texas Court of Criminal Appeals poses a dual threat to the Fourth Amendment and HIPAA. First, it vitiates the necessary oversight of law enforcement. The Fourth Amendment requires magistrates to issue warrants to protect citizens from government overreach. HIPAA requires grand juries (actual grand juries, not a prosecutor acting as a one-man grand jury) to issue subpoenas to protect disclosure of a citizen's medical records. Neither one is relevant now in Texas when it comes to information contained in medical records.

Second, the law created in the case below cloaks members of the Executive Branch with unchecked secrecy traditionally only afforded the Judicial Branch. Acting as a "grand jury" and without oversight, the prosecutor can peruse a person's medical records without a citizen's knowledge. As detailed in the Petition,

there is a significant debate among the state and federal courts about whether the Constitution, HIPAA, and opinions of this Court forbid such an intrusion.

CONCLUSION

As set forth in the Petition and above, courts are deeply divided on the amount of privacy afforded medical records. In addition to how far the Fourth Amendment extends to medical records, there is also a concern for the undeniable protections created by HIPAA. Citizens can no longer benefit from these constitutional and federal statutory protections. Petitioner requests this Court grant certiorari to give guidance on this deeply divisive issue and to delineate the extent of the protections afforded medical records by the Fourth Amendment and HIPAA. Petitioner accordingly requests the Court grant certiorari.

Respectfully submitted,

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