No. _____

In The

Supreme Court of the United States

SERGIO HERRERA,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Eighth District Court Of Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In those cases where a sexual assault victim is unavailable at trial and not subject to cross-examination, does the Confrontation Clause of the Sixth Amendment permit the government to introduce into evidence the statements of the victim of sexual assault through a sexual assault nurse examiner who provides medical treatment to the victim, but who also acts as a law enforcement agent tasked with obtaining statements from the victim and collecting forensic evidence to be used by the government in a criminal trial?

PARTIES TO THE PROCEEDINGS

Petitioner Sergio Herrera was the Defendant and Appellant below.

Respondent State of Texas was the prosecuting government authority and Appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Sergio Herrera respectfully petitions for a writ of certiorari to review the judgment of the Eighth District Court of Appeals of Texas.

OPINIONS BELOW

The opinion of the Eighth District Court of Appeals of Texas is not reported; but it is available at 2013 Tex. App. LEXIS 11569 (Tex. App. – El Paso Sept. 11, 2013). (App. *infra* at 1-22). The opinion from the Texas Court of Criminal Appeals is reported at 424 S.W.3d 52 (Tex. Ct. Crim. App. 2014). (App. *infra* at 23-26).

JURISDICTION

The Texas Court of Criminal Appeals, the highest court in Texas for criminal cases, refused to review the decision of the Eighth District Court of Appeals of Texas on February 26, 2014. No motions for rehearing were filed with the Texas Court of Criminal Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

Petitioner fully preserved his objection to the introduction of the victim's out-of-court statements through a sexual assault nurse examiner in the courts below. In the trial court, Petitioner objected to the introduction of this evidence on the basis that it

violated the Confrontation Clause of the Sixth Amendment. (Vol. 3 R.R. 6:21-24:24, 63:9-15). The Eighth District Court of Appeals of Texas addressed this objection on the merits in Petitioner's appeal. (App. *infra* at 3-9).

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

INTRODUCTION

In *Melendez-Diaz v. Massachusetts*, this Court found that out-of-court statements made to medical professionals for treatment purposes are "not testimonial" for purposes of the Confrontation Clause of the Sixth Amendment. *See* 557 U.S. 305, 312 n.2 (2009). However, this Court, in *Melendez-Diaz*, left unanswered whether similar out-of-court statements would still be considered nontestimonial when the medical professional is acting in a dual role as a forensic analyst, specifically tasked by law enforcement with interviewing crime victims, gathering forensic evidence, and obtaining statements from the victims for use at a later criminal trial. This case presents that issue.

Petitioner Sergio Herrera was convicted of aggravated sexual assault of an elderly person by the State of Texas. (C.R. 100). He was sentenced to twenty-three years in prison. (*Id.* at 86, 94). The day after the alleged sexual assault, the victim was examined by a sexual assault nurse examiner ("SANE"). (Vol. 3 R.R. 56:1-11). The SANE, who is credentialed and trained by the Texas Attorney General to conduct forensic exams of sex abuse victims and render testimony as an expert witness, evaluated the victim. (*See generally id.* at 56:1-93:6). As part of the evaluation, the SANE obtained statements from the victim and conducted a forensic exam. (*See id.*). The victim, for reasons unrelated to the sexual assault, died before the trial without giving any formal testimony. (*See id.* at 10:15-25). As a result of her death, the victim was unavailable for cross-examination at trial. (*See id.*).

At trial, the State of Texas relied on the out-of-court statements made by the victim to the SANE. (Vol. 3 R.R. at 45:13-73:25). Petitioner objected to the introduction of any testimony from the SANE that purported to recount the statements of the victim on the basis that the statements of the victim to the SANE were testimonial under the Confrontation Clause of the Sixth Amendment. (*Id.* at 6:21-24:24). The State of Texas responded that the statements made by the victim to the SANE were not subject to the Confrontation Clause because they were made, at least partially, for the purpose of medical diagnosis and treatment. (*See id.*). The trial court overruled Petitioner's objection and permitted the SANE to

testify, resulting in Petitioner's conviction. (*Id.* at 24:19-25:2). The Eighth District Court of Appeals of Texas affirmed the trial court's decision and the Texas Court of Criminal Appeals, the highest court in Texas for criminal cases, refused Petitioner's petition for discretionary review. (App. *infra* at 23). Despite refusing review, Justice Cathy Cochran of the Texas Court of Criminal Appeals acknowledged that the Confrontation Clause issue "that Petitioner raise[d] was important" – one that raised an "important constitutional issue." *Herrera v. State*, 424 S.W.3d 52, 53 (Tex. Ct. Crim. App. 2014).

Presently, there is a deep conflict among the Nation's state supreme courts and federal circuit courts on the admissibility of a SANE's testimony based on the victim's statements when the victim is unavailable for cross-examination and trial. Indeed, commentators have noted that "courts are not currently consistent in their analyses of the admissibility of SANE factual testimony." *See, e.g.*, Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 296 (Winter 2013). The conflicting rules that have divided the courts have not been lost on the Nation's state supreme courts. As the Kansas Supreme Court recently observed, "numerous other states have considered the question of whether statements made by sexual assault victims to medical professionals are testimonial. Our review of the decisions cited by the parties and many other decisions

reveals that jurisdictions are divided on this issue." *State v. Miller*, 264 P.3d 461, 562 (Kan. 2011).

Some state supreme courts have held that the Confrontation Clause prohibits a SANE from offering testimonial statements from a victim of sexual assault, regardless of the fact that some medical treatment was provided by the SANE during the forensic examination. *See generally State v. Hooper*, 176 P.3d 911 (Idaho 2007); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *Medina v. State*, 143 P.3d 471 (Nev. 2006); *State v. Romero*, 156 P.3d 694 (N.M. 2007); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008); *In re Rolandis G*, 902 N.E.2d 600 (Ill. 2008); *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006); *State v. Payne*, 694 S.W.2d 935, 942 (W. Va. 2010). However, other state supreme courts have held to the contrary, finding that a SANE or other similar medical forensic examiner may testify concerning statements made by an unavailable victim of sexual assault because the medical purpose of a SANE or forensic examiner's evaluation trumps any concerns that arise under the Confrontation Clause. *See generally State v. Stahl*, 855 N.E.2d 834 (Ohio 2006); *State v. Miller*, 264 P.3d 461 (Kan. 2011); *State v. Arroyo*, 935 A.2d 975 (Conn. 2007).

The same conflict exists in the federal circuits. The Eighth Circuit, for instance, found a Confrontation Clause violation in a case where a forensic interviewer testified at trial concerning a victim's statements. *United States v. Bordeaux*, 400 F.3d 548, 555-56 (8th Cir. 2005) ("[W]e decide that evidence

from the forensic interview must be excluded under the [C]onfrontation [C]lause because the interview was the sort of '*ex parte* examination' at which the [C]onfrontation [C]lause is aimed."). That decision is contrary to the Ninth Circuit's decision in *United States v. Gonzalez*, which held that the forensic function of a SANE did not change the examiner's role as a nurse who was performing a medical examination of a victim. 533 F.3d 1057, 1062 (9th Cir. 2008) (explaining the SANE's forensic function of evidence collection "did not obliterate her role as a nurse, in a hospital, performing a medical examination of a victim of a sexual assault"). In light of the split among the various state supreme courts and federal circuit courts, the Court should grant certiorari and review the decision of the Eighth District Court of Appeals of Texas.

STATEMENT OF THE CASE

This case presents a question that has caused substantial disagreement among the Nation's state supreme courts and federal circuit courts: in those cases where a sexual assault victim is unavailable at trial and not subject to cross-examination, does the Confrontation Clause of the Sixth Amendment permit the government to introduce into evidence the statements of a victim of sexual assault through a sexual assault nurse examiner who provides medical treatment to the victim, but also acts as a law enforcement agent tasked with obtaining statements from the

victim and collecting forensic evidence to be used by the government in a criminal trial?

1. Petitioner Sergio Herrera was convicted of aggravated sexual assault of an elderly person, a felony under Texas law, and sentenced to twenty-three years in prison. (C.R. 86, 94, 100). The alleged victim died of unrelated causes before Petitioner's trial. (Vol. 3 R.R. 10:15-25). As a result of her death, the alleged victim was not available for cross-examination; and she did not testify at trial. Because she was unavailable, the State of Texas relied heavily on the statements made by the victim to Kathleen Justice, a SANE who examined the victim a day after the alleged sexual assault and who collected forensic evidence to be used in the prosecution of Petitioner. (*Id.* at 56:1-93:6).

2. At trial, SANE Justice testified regarding courses and training that she took to become a certified SANE in Texas. To become a certified SANE, she testified that she had to take courses mandated by the Texas Attorney General. (Vol. 3 R.R. 47:7-12) ("And the training that is required in Texas [to become a SANE] is a course put on by the Attorney General's office of the State."); *see also id.* at 76:4-9). Specifically, SANE Justice testified she had to take "a two-week didactic course, eight hours a day, four days a week" required by the Texas Attorney General. (*Id.*). The two-week course consisted of, among other things, "16 hours of courtroom observation of felony cases. And then after that, . . . six adult evidentiary exams which involve[d] the collection of evidence on

acute sexual assault cases." (*Id.* at 47:17-48:1). To keep her SANE certification, she has to renew "all of this paperwork" with the Texas Attorney General every two years. (*Id.* at 48:1-3).

3. Although she provides medical treatment to sexual abuse victims, SANE Justice admitted that most of her SANE exams are connected to law enforcement. (*See* Vol. 3 R.R. 49:21-25). Acting in this forensic role, SANE Justice interviews sex abuse victims to gather information that may be relevant to law enforcement and prosecution. (*Id.* at 50:18-51:3) ("Well, I get a history from the patient. . . . And then we get into the history of what happened to the patient and to find out where it happened, [and] when it happened. . . .").

4. In this case, SANE Justice interviewed the victim and captured her statements in a chart before trial. (Vol. 3 R.R. 54:4-14). Petitioner objected to the introduction of the chart and any testimony from SANE Justice that purported to recount the statements of the victim, arguing that the statements of the victim to the SANE were testimonial for purposes of the Confrontation Clause of the Sixth Amendment. (Vol. 3 R.R. 6:21-24:24, 63:9-15). The State of Texas, in turn, responded that the statements made by the victim to SANE Justice were not subject to the Confrontation Clause because they were made, at least partially, for the purposes of medical diagnosis and treatment. (*Id.* at 6:21-24:24). The trial court overruled Petitioner's objection and permitted SANE Justice to testify at trial. (*Id.* at 24:19-25:2, 63:9-15).

Accordingly, SANE Justice testified, in relevant part, as follows:

Q: Would you, beginning on 9/9/09 at 18:39 hours, would you read what is contained on this page to make sure that we understand what your documentation was.

A: Okay. It says, "This event happened last night in the patient's room in assisted living. Male came into her room and she [sic] slammed her door opened. Patient was sitting on the couch watching TV." These direct quotes from the patient here. "He said I was too skinny and needed to fatten up. He kept putting his hand on her shoulders. He made her" – I'm sorry, these are not direct quotes. "He said I was too skinny and needed to fatten up." That is a quote from the patient. "He made her get up – he put his hands on her shoulder and he made her get up and patted her butt. He forced her over."

* * *

A: Okay. This is continued. "He forced her over to the bed. He made her lay down on it and he was taking his britches off all the time." That was – "britches off all the time" was the way she put it.

* * *

Q: All right. And the number of assailants?

A: She said one.

Q: And the race of the assailant?

A: She said [the assailant] was light-skinned. That's what she told me.

(Vol. 3 R.R. 56:12-16, 58:5-59:7).

5. Although Petitioner testified that the sexual act was consensual (Vol. 3 R.R. 203:16-18), the jury convicted him of aggravated sexual assault based on SANE Justice's testimony. (*See* C.R. 86, 94, 100). Accordingly, Petitioner appealed this judgment to the Eighth District Court of Appeals of Texas. (App. *infra* at 1-22).

6. The Eighth District Court of Appeals of Texas rejected Petitioner's challenge to the introduction of the SANE's testimony, holding that it did not violate the Confrontation Clause of the Sixth Amendment. 2013 Tex. App. LEXIS 11569, at *8 (Tex. App. – El Paso Sept. 11, 2013). In reaching this conclusion, the court relied exclusively on the footnote in *Melendez-Diaz*, finding that, "[w]hen out-of-court statements in the context of an interview are made primarily for the purpose of medical diagnosis and treatment, they are not testimonial." *Id.* at **5-6 (citing *Melendez-Diaz*, 557 U.S. at 312 n.2). Specifically, the court held that "[t]he primary purpose of the statements made to [SANE] Justice and the SANE exam were to allow [SANE] Justice to evaluate [the alleged victim], formulate a diagnosis, and provide care." *Id.* at *9. Therefore, relying on *Melendez-Diaz*, the court held that "[t]he records and statements [the victim] made to [SANE] Justice . . . were made with a primary

purpose of medical diagnosis and treatment, and not criminal investigation, thus, they are nontestimonial in nature." *Id.* at *9 (citing *Melendez-Diaz*, 557 U.S. at 312 n.2).

7. Thereafter, Petitioner sought review by the Texas Court of Criminal Appeals, the highest court in Texas for criminal cases. (*See* App. *infra* at 23-26). The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review. 424 S.W.3d 52 (Tex. Ct. Crim. App. 2014). Although this issue was not considered by the Texas Court of Criminal Appeals, this Court should grant certiorari and review the decision by the Eighth District Court of Appeals of Texas.[1]

[1] The Texas Court of Criminal Appeals refused review of this case for "procedural reasons" because it apparently believed that any potential Confrontation Clause violation was harmless error, which is considered a procedural issue under the Texas Rules of Appellate Procedure. *See Herrera v. State*, 424 S.W.3d 52, 53 (Tex. Ct. Crim. App. 2014) (Cohran J., concurring); *see also* TEX. R. APP. P. 44.2 ("If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment"). But its refusal to grant Petitioner's petition for discretionary review should not be viewed as an adequate and independent state ground that justifies Petitioner's conviction because "whether a conviction for crime should stand when a State has failed to accord federal constitutionally

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REASONS FOR GRANTING THE PETITION

SANEs act in dual roles: medical and forensic. These dual functions have caused substantial confusion among the lower courts as to whether a SANE may testify regarding the statements made by a victim of sexual assault when the victim does not testify at trial and is otherwise unavailable for cross-examination.*

This issue, however, is not unique to Texas. This is a national problem. SANEs are active in at least forty states.[2] There are over 400 separate SANE

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guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). Indeed, there is no basis for this Court to assume that the refusal of the Texas Court of Criminal Appeals to grant Petitioner's petition for discretionary review rests on adequate and independent state grounds when the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Delaware v. Van Arsdall*, 475 U.S. 673, 674 (1986). Moreover, when addressing violations of the Confrontation Clause, this Court has typically remanded the case to the lower court to conduct a harmless-error analysis. *See, e.g.*, *id.* at 687 ("We believe that the determination whether the Confrontation Clause error in this case was harmless beyond a reasonable doubt is best left to the Delaware Supreme Court in the first instance."); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n.11 (2011) ("[W]e express no view on whether the Confrontation Clause error in this case was harmless. The New Mexico Supreme Court did not reach that question, and nothing in this opinion impedes a harmless-error inquiry on remand.").

[2] ALA. ADMIN. CODE r. 610-X-2-.07 (2013) [Alabama]; *Breeden v. State*, 2013 Ark. 145 (2013) [Arkansas]; *Ramsey v.*

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Yavapai Family Advocacy Ctr., 235 P.3d 285 (Ariz. Ct. App. 2010) [Arizona]; *People v. Villatoro*, 194 Cal. App. 4th 241 (Cal. Ct. App. 2011) [California]; *People v. Montanez*, 300 P.3d 940 (Co. Ct. App. 2012) [Colorado]; *State v. Ramirez*, 921 A.2d 702 (Conn. Ct. App. 2007) [Connecticut]; *Franklin v. State*, 869 A.2d 327 (Del. Sup. Ct. 2005) [Delaware]; *Gutierrez v. State*, 133 So. 3d 1125 (Fla. Ct. App. 2014) [Florida]; *Ottley v. State*, 752 S.E.2d 92 (Ga. Ct. App. 2013) [Georgia]; *State v. Hooper*, 176 P.3d 911 (Idaho 2007) [Idaho]; *People v. Everhart*, 939 N.E.2d 82 (Ill. App. Ct. 2010) [Illinois]; *Perry v. State*, 956 N.E.2d 51 (Ind. Ct. App. 2011) [Indiana]; *State v. White*, 834 N.W.2d 872 (Iowa Ct. App. 2013) [Iowa]; *State v. Bennington*, 264 P.3d 440 (Kan. 2011) [Kansas]; *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009) [Kentucky]; *State v. Magee*, 116 So. 3d 948 (La. Ct. App. 2013) [Louisiana]; *Green v. State*, 22 A.3d 941 (Md. Ct. Spec. App. 2011) [Maryland]; *People v. Spangler*, 774 N.W.2d 702 (Mich. Ct. App. 2009) [Michigan]; *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011) [Minnesota]; *State v. Woods*, 357 S.W.3d 249, 252 (Mo. Ct. App. 2012) [Missouri]; *Young v. State*, 106 So. 3d 775 (Miss. 2012) [Mississippi]; *Medina v. State*, 143 P.3d 471 (Nev. 2006) [Nevada]; *State v. Letendre*, 13 A.3d 249 (N.H. 2011) [New Hampshire]; N.J. STAT. ANN. § 52:4B-51 (West 2001) [New Jersey]; *State v. Romero*, 156 P.3d 694 (N.M. 2007) [New Mexico]; *People v. Vaello*, 91 A.D.3d 548 (N.Y. App. Div. 2012) [New York]; N.C. GEN. STAT. § 143B-1200 (2011) [North Carolina]; *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) [Ohio]; *State v. Beauvais*, 261 Or. App. 837 (2014) [Oregon]; *Commonwealth v. Jennings*, 2008 PA Super. 230 (Pa. Super. Ct. 2008) [Pennsylvania]; *State v. Thompson*, 575 S.E.2d 77 (S.C. Ct. App. 2003) [South Carolina]; *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008) [Tennessee]; *Sergio Herrera v. State*, 2013 Tex. App. LEXIS 11569 (Tex. App. – El Paso Sept. 11, 2013) [Texas]; VT. STAT. ANN. TIT. 33, § 321 (2007) [Vermont]; *Commonwealth v. Brown*, 2006 Va. App. LEXIS 152 (Va. Ct. App. 2006) [Virginia]; *State v. Moeller*, 2011 Wash. App. LEXIS 1383 (Wash. Ct. App. Jun. 13, 2011) [Washington]; W. VA. CODE § 61-8B-15 (2006) [West Virginia]; *State v. Deadwiller*, 834 N.W.2d 362 (Wis. 2013) [Wisconsin]; *McLaury v. State*, 2013 WY 89, 305 P.3d 1144 (Wyo. 2013) [Wyoming].

offices throughout the Nation, most of which act as an extended arm of law enforcement. *See, e.g.*, Steven A. McLaughlin et al., *Implementation and Evaluation of a Training Program for the Management of Sexual Assault in the Emergency Department*, ANNALS OF EMERGENCY MEDICINE 489, 489 (2007).

A SANE has a unique role in the prosecution process. Undoubtedly, SANEs provide some medical treatment to victims of sexual assault. But one of the primary roles of a SANE is to collect forensic evidence directly from the victim for use at a later prosecution. *See, e.g.*, Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569, 630 (2007) ("Admittedly, part of the SANE's role is also to gather evidence of sexual assault or injuries to the patient."). A SANE's "special expertise in gathering evidence for subsequent prosecution of the offender . . . raises appropriate concerns about whether the statement was made for the purposes of seeking medical care or whether a medical provider could have reasonably relied on the statement for diagnosis or treatment of the declarant." *See State v. Mendez,* 242 P.3d 328, 340 (N.M. 2010).

The forensic evidence can include specimens. But it regularly includes statements by the victim to the SANE that identify details concerning the crime and even the alleged perpetrator. That is consistent with the overriding goal of having a forensic examination

done by a SANE in order to obtain convictions in sexual assault cases. A "SANE program introduces private, compassionate surroundings alongside the coordinated efforts of law enforcement and crisis intervention under the overall aim of achieving a higher conviction rate." Patricia Furci, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend that Far?* 5 QUINNIPIAC HEALTH L.J. 229, 230 (2002). This desire to increase conviction rates is borne from "[an] increased consistency in the working relationships of SANE personnel with law enforcement and prosecution. SANE nurses are available for pre-trial interviews, court appearances, and . . . explanations of medical findings." Cameron S. Crandall & Deborah Helitzer, *Impact Evaluation of a Sexual Assault Nurse Examiner (SANE) Program*, DOJ 70 (2003). "Law enforcement educates SANE[s] on what to (and not to) ask and the reasoning or intent behind police investigation." *See id.* at 71. The "[p]rosecution trains SANE[s] on laws and courtroom demeanor, judicial process and building credibility." *Id.* "Prior to SANEs, this kind of collaboration between doctors and prosecutors did not exist." *Id.* at 70.

It is not surprising, then, that SANEs often function as the right hand of law enforcement. Texas, for example, requires SANEs to obtain special training for assisting the prosecution, including a demonstrated "competency in conducting a forensic exam for the collection of evidence." 1 TAC § 62.25(2). A SANE is also expected to be an effective "expert witness" for

the State in a criminal trial. *Id.* § 62.26(d)(35). A SANE, moreover, must obtain a certification from the Attorney General of the State of Texas. *Id.* § 62.1. The relationship between SANEs and law enforcement is palpably intertwined.

> Exams in Texas are ordered by either a law enforcement agency or a district attorney's office. . . . Local police agencies pay for the examination and are reimbursed by the Crime Victim Compensation Fund managed by the Office of the Attorney General (OAG) after the submission of required documentation. If and when sexual assault cases go to trial, SANEs may be required to testify about forensic evidence they collected during exams. They usually testify as expert witnesses and communicate with prosecutors prior to the court date.

William Stone et al., *Law Enforcement Perceptions of Sexual Assault Nurses in Texas*, THE SW. J. OF CRIM. J. 103, 103 (2006).

The close relationship that Texas SANEs have to law enforcement agencies also exists in other states. New Jersey law, for instance, provides that the Attorney General shall establish a "Statewide Sexual Assault Nurse Examiner program in the Department of Law and Public Safety." N.J. STAT. ANN. § 52:4B-50 (West 2001). County prosecutors in that state must "appoint or designate" a SANE to coordinate the Attorney General's program. *Id*. Additionally, North Carolina's statutes recognize that examinations by

SANEs are "forensic" in nature. *See* BLACK'S LAW DICTIONARY 648 (6th ed. 1990) (defining "forensic" as "belonging to courts of justice"). The forensic examination is "provided to a sexual assault victim by medical personnel trained to gather evidence of a sexual assault" for the specific purpose of ensuring that evidence is "suitable for use in a court of law." N.C. GEN. STAT. § 143B-1200 (2011). Vermont's statutes provide that SANEs are governed by a board whose members must include the "Director of the Vermont State Police Crime Lab," as well as "law enforcement officers assigned to one of Vermont's special units of investigation." VT. STAT. ANN. TIT. 33, § 322 (2007). In Kentucky, a SANE conducts examinations only "upon the request of any peace officer or prosecuting attorney." KY. REV. STAT. ANN. § 216B.400(4) (2013).

The decision below ignores this reality in favor of adopting a blanket rule that the partial medical purpose of a SANE's examination somehow insulates all statements made during the examination from any scrutiny under the Confrontation Clause. That is, of course, contrary to the class of testimonial statements recognized by this Court in *Crawford* as causing the most concern to the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 53 (2004) ("even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class").

A. There Is A Real And Substantial Conflict Among The State Supreme Courts On Whether The Statements Of Victims Of Sexual Assault To A SANE Are Testimonial For Purposes Of The Confrontation Clause.

Put simply, there is a deep and entrenched conflict among the Nation's state supreme courts and federal circuit courts on the question presented. As one commentator has noted, "courts are not currently consistent in their analyses of the admissibility of SANE factual testimony." Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 296 (Winter 2013).

Some states allow a SANE to testify concerning statements made by the victim of sexual assault without any consideration of whether the statements are with an "eye" toward prosecution. The decision below represents the rule used in Texas: a SANE can testify concerning statements made by a victim of sexual assault because the partial medical purpose of a SANE's examination trumps any concerns regarding potential testimonial statements that are subject to scrutiny under the Confrontation Clause. *See Herrera v. State*, No. 08-11-00193-CR, 2013 Tex. App. LEXIS 11569 (Tex. App. – El Paso Sept. 11, 2013); *Berkley v. State*, 298 S.W.3d 712 (Tex. App. – San Antonio 2009, pet. ref'd); *Beheler v. State*, 3 S.W.3d 182, 188-89 (Tex. App. – Fort Worth 1999, pet. ref'd). The rule adopted by the Ohio Supreme Court is

virtually identical. *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006). A statement made by a victim to a SANE is never subject to scrutiny under the Confrontation Clause. *Id*.

But other states have reached the opposite conclusion. Six state courts of last resort have held that the Confrontation Clause prohibits a SANE from offering testimonial statements from a victim of sexual assault, regardless of whether some medical treatment is provided by the SANE during the examination. *State v. Hooper*, 176 P.3d 911 (Idaho 2007); *State v. Bennington*, 264 P.3d 440 (Kan. 2011); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *Medina v. State*, 143 P.3d 471 (Nev. 2006); *State v. Romero*, 156 P.3d 694 (N.M. 2007); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008).

Even among these courts, there is confusion as to the appropriate standards to be used in analyzing the admissibility of statements under the Confrontation Clause. The Tennessee Supreme Court, for instance, has cautioned against adopting a blanket rule for determining whether SANEs can testify concerning their interviews with crime victims. *Cannon*, 254 S.W.3d at 305. That approach, nevertheless, is contrary to the one taken by other state courts of last resort. In Kansas, statements made to a SANE are viewed as testimonial for purposes of the Confrontation Clause, even if there is a "dual purpose of assessment for medical purposes." *Bennington*, 264 P.3d at 453. Indeed, Kansas's high court acknowledges that a SANE's role in gathering evidence to be used

at a prosecution is a strong indication that a SANE is acting as an "agent" of law enforcement. *Id*. at 455. Similarly, the Kentucky Supreme Court has refused to grant blanket immunity to statements made to a SANE during a SANE examination because the questions of a SANE are primarily for the purpose of gathering information for the police. *Hartsfield*, 277 S.W.3d at 244. That approach, however, differs from the one used by the Idaho Supreme Court, which has adopted the rule that statements made by a victim during an interview with a forensic examiner are testimonial to the extent that there is police involvement in the examination.[3] *Hooper*, 176 P.3d at 916-17.

B. The Question Presented Is An Important One That Warrants Review.

The error committed by the Texas court will have serious consequences. By granting blanket immunity to statements made by victims to a SANE, Texas courts have effectively precluded any meaningful review on this issue under the Confrontation Clause. After all, the partial medical purpose of a SANE who

[3] Not surprisingly, the intermediate state courts of appeals are also a patchwork of conflicting decisions. *Compare Perry v. State*, 956 N.E.2d 41, 56 (Ind. Ct. App. 2011) (victim's statements to SANE are not testimonial); *Commonwealth v. Brown*, Cause No. 3082-05-12006, VA. App. LEXIS 152, at **9-10 (Va. Ct. App. Apr. 20, 2006) (same); *with State v. Jackson*, No. 283092, 2010 WL 1726743 (Mich. Ct. App. Apr. 29, 2010) (statements to SANE are testimonial).

interviews a crime victim to collect evidence for the government overrides everything else.

But that cannot be what this Court's precedents mean. The decision below forgets the fact that the Confrontation Clause is most concerned when agents of the government are involved in obtaining testimony to be used during a later prosecution. *Crawford*, 541 U.S. at 56 n.7 ("involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse, a fact borne out time and again throughout a history with which the Framers were keenly familiar"). Indeed, the holding in *Melendez-Diaz* concerning statements for medical purposes and treatment as not being testimonial surely does not mean that a statement to a person who is acting at the specific direction of law enforcement can somehow transform a testimonial statement into one that can never be testimonial. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011) (holding that non-State actors might be considered agents for purposes of analyzing whether statements are testimonial). This case allows the Court to clarify the question that went unanswered in *Melendez-Diaz* – how to analyze out-of-court statements made to forensic analysts that have a dual purpose of coordinating medical treatment and providing forensic evidence for the government in a future criminal prosecution.

To allow the Nation's state supreme courts to adopt blanket rules that a partial medical purpose behind a conversation or encounter will always

prevent any inquiry under the Confrontation Clause is dangerous. Law enforcement will have an all too easy excuse to arrange custodial interrogation through non-State actors who are charged with the same law enforcement functions that police normally provide – the very danger that prompted the Idaho Supreme Court to cry foul under the Confrontation Clause despite the protest by the government that it was only a medical exam. *Hooper*, 176 P.3d at 916-17. Worse yet, a blanket rule would nullify the reality acknowledged by the Court in *Davis* that statements may evolve from nontestimonial to testimonial depending on the circumstances. *Davis v. Washington*, 547 U.S. 813, 828 (2006).

Indeed, this case presents an opportunity for the Court to remedy and address the conflict that is boiling in the state supreme courts concerning forensic examiners who interview crime victims and who function in roles that are virtually identical to a SANE. Already, the highest court in Connecticut disagrees with the result reached by the Illinois, West Virginia, and North Dakota supreme courts concerning statements made to forensic examiners who interview crime victims at the behest of law enforcement. *Compare State v. Arroyo*, 935 A.2d 975 (Conn. 2007) (statements to forensic investigator were not testimonial because one of the purposes of the investigator was to determine the victim's medical needs), *with In re Rolandis G*, 902 N.E.2d 600 (Ill. 2008); *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006); *State v. Payne*, 694 S.W.2d 935, 942 (W. Va. 2010).

Furthermore, the problem has now reached the federal circuit courts. The Eighth Circuit, for instance, has found a Confrontation Clause violation in a case where a forensic interviewer testified at trial concerning a victim's statements. *Bordeaux*, 400 F.3d at 555-56. And that decision is contrary to the Ninth Circuit's decision in *United States v. Gonzalez*, which held that the forensic function of a sexual assault examiner nurse did not change the examiner's role as a nurse who was performing a medical examination of a victim. *Gonzalez*, 533 F.3d at 1062.

The conflict is not going to go away. The Court's potential decision to review any of the cases pending before the Court concerning the admissibility of forensic pathology reports under the Confrontation Clause[4] will not address the question presented. None of the pending cases concerning forensic reports appear to address forensic interviewers, such as SANEs, who act in a dual capacity by providing medical treatment to victims while also interviewing and collecting evidence from those victims in cooperation with, or at the specific request and direction of,

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[4] *See Mallay v. United States*, No. 13-632; *Turner v. United States*, No. 13-127; *Brewington v. North Carolina*, No. 13-504; *Ortiz-Zape v. North Carolina*, No. 13-633; *Derr v. Maryland*, No. 13-637; *Cooper v. Maryland*, No. 13-644; *Galloway v. Mississippi*, No. 13-761; *Yohe v. Pennsylvania*, No. 13-885; *Bolus v. Pennsylvania*, No. 13-1079; *Alger v. California*, No. 13-1102; *Maxwell v. United States*, No. 13-7394; *Edwards v. California*, No. 13-8618; *Johnson v. California*, No. 13-8705; *Walker v. Wisconsin*, No. 13-8743.

law enforcement. Similarly, none of the pending cases address forensic interviewers who interview victims of sexual assault with an eye toward using the victim's statements to prosecute the offender. Only this Court can provide the guidance needed to sort out why SANEs or similar forensic examiners are viewed as just another nurse in Texas, Connecticut, and Minnesota; whereas the same person in Idaho, Kentucky, New Mexico, Tennessee, and Kansas is viewed as an agent of law enforcement that will mandate careful scrutiny of any testimonial statements made by a victim during the forensic examination under the Sixth Amendment. The Court should resolve this conflict.

CONCLUSION

Accordingly, for these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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May 27, 2014

SERGIO HERRERA, Appellant, v. THE STATE OF TEXAS, Appellee.

No. 08-11-00193-CR

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

2013 Tex. App. LEXIS 11569

September 11, 2013, Decided

JUDGES: Before McClure, C.J., Rivera, and Antcliff, JJ. Antcliff, J., not participating.

OPINION BY: GUADALUPE RIVERA

OPINION

A jury convicted Sergio Herrera, Appellant, of aggravated sexual assault of an elderly individual, and assessed punishment at twenty-three years' imprisonment. In three issues on appeal, Appellant complains of (1) the admission of statements the victim made to a sexual-assault nurse examiner and a psychologist, (2) the admission of Appellant's recorded statements to police, and (3) the admission of those portions of his recorded statements invoking his right to counsel. For the following reasons, we affirm.

BACKGROUND

Because Appellant does not challenge the sufficiency of the evidence to support his conviction, only a brief recitation of the facts is necessary. On September 17, 2009, City of El Paso Police Detectives

Deanne Hicks and Jimmy Aguirre arrested Appellant pursuant to an arrest warrant[1] for the aggravated sexual assault of Joyce Stautzenberger (hereinafter J.S.), an eighty-five-year-old woman.[2] While Appellant was being transported to the police station, Appellant was asked to read aloud a card containing his *Miranda*[3] warnings. Appellant complied and then signed the card. During this time, Appellant was not questioned by police.

At the police station, after Appellant agreed to give a recorded statement, he was again asked to read aloud a *Miranda* warning card. Appellant read the *Miranda* warning card for the second time and told detectives that he wanted to know what the allegations were before deciding whether or not to obtain the services of an attorney. After the allegations were explained to him, Appellant continued the interview and denied having any sexual contact with J.S. At the end of the interview, Appellant invoked his right to counsel and the detectives refrained from further questioning. Appellant was then placed in a holding cell while the booking paperwork was completed.

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[1] Appellant was also arrested for outstanding traffic warrants.

[2] Shortly after the incident, J.S. was diagnosed with cancer and passed away.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

While in the holding cell, Appellant signaled to Detective Aguirre and stated that he had been embarrassed by the presence of the female detective, but he "wished to plead guilty to consensual sex. . . ." Prior to giving a second recorded statement, Appellant again read aloud and signed a *Miranda* warning card. Appellant told Detective Aguirre that he understood his rights and was willing to speak to him.

Appellant was charged by indictment with the aggravated sexual assault of an elderly individual. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(A), (C) (West 2011). Prior to trial, Appellant moved to suppress the two recorded statements he gave to police claiming violations of articles 38.22 and 38.23 of the Code of Criminal Procedure and violations of his right to counsel. The trial court denied Appellant's motion to suppress and entered findings of fact and conclusions of law. At trial, Appellant pleaded not guilty to the alleged offense. The *Miranda* warning cards signed by Appellant and his recorded statements to police were admitted into evidence over the objections of Appellant.

DISCUSSION

CONFRONTATION RIGHTS

In Issue One, Appellant contends that his Sixth and Fourteenth Amendment rights were violated by the admission of statements made by J.S., who was unavailable for confrontation and cross-examination due to her death, to Kathleen Justice, a sexual-assault

nurse examiner (SANE), and Diane Bryan, a clinical psychologist. Outside the presence of the jury, the State argued that J.S.'s statements were admissible under Rule 803(4) of the Texas Rules of Evidence. *See* TEX. R. EVID. 803(4) (providing that hearsay statements meeting the following criteria are not excluded by the hearsay rule: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."). On appeal, Appellant argues that J.S.'s statements to Nurse Justice were not made for purposes of medical diagnosis and treatment, but were made for purposes of investigating a sexual assault allegation. Similarly, Appellant asserts that J.S.'s statements to Dr. Bryan do not fit any hearsay exception because Dr. Bryan counseled J.S. long after the alleged sexual assault occurred.

Standard of Review and Applicable Law

The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses. *Langham v. State*, 305 S.W.3d 568, 575 (Tex.Crim.App. 2010); *see also* U.S. CONST. amend. VI. The Confrontation Clause is binding on the states under the Fourteenth Amendment. *Michigan v. Bryant*, 131 S.Ct. 1143, 1152, 179 L.Ed.2d 93 (2011). In *Crawford v. Washington*, the Supreme Court held that the

Confrontation Clause bars out-of-court statements that are testimonial, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The threshold inquiry for supposed Confrontation Clause violations is whether the admitted statements are testimonial or nontestimonial in nature. *Vinson v. State*, 252 S.W.3d 336, 338 (Tex.Crim.App. 2008); *Lollis v. State*, 232 S.W.3d 803, 805-06 (Tex.App. – Texarkana 2007, pet. ref'd). Whether a statement is testimonial or nontestimonial is a question of law that we review *de novo*. *Langham*, 305 S.W.3d at 576; *see also Wall v. State*, 184 S.W.3d 730, 742 (Tex.Crim.App. 2006). Statements are testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). When out-of-court statements in the context of an interview are made primarily for the purpose of medical diagnosis and treatment, they are not testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (medical records created for purposes of treatment are not testimonial within the meaning of *Crawford*); *Berkley v. State*, 298 S.W.3d 712, 715 (Tex.App. – San Antonio 2009, pet. ref'd) (holding that SANE's report was nontestimonial where State presented evidence that purpose of report was to render proper medical diagnosis and treatment).

It appears to be undisputed that Appellant did not have a prior opportunity to cross-examine J.S. Thus, we must determine whether J.S.'s statements were testimonial or non-testimonial in order to decide whether Appellant's confrontation rights were violated.

Nurse Justice's Testimony

At trial, Nurse Justice testified that she was employed by Sierra Medical Center. She further testified that she was not aligned with law enforcement and was not biased in favor of the prosecution. Nurse Justice explained that a SANE exam is performed to evaluate and treat the victim. She explained that as part of the SANE exam which is documented in a medical record, she obtains a history from the patient which includes a history of allergies, medications, illnesses, surgeries, what happened to the patient, where it happened, when it happened, and whether the patient was injured or in any pain. The purpose of obtaining a patient history is to evaluate the patient, provide care, and formulate a diagnosis. Nurse Justice examined J.S. at the hospital the day after the alleged sexual assault occurred. At trial, she identified and explained the medical records relating to J.S.'s SANE exam. According to Nurse Justice, J.S. an eighty-five-year-old resident of an assisted living facility, reported that the previous night, a male had entered her room, made her lay down on the bed, and raped her despite her protests for him to stop. Nurse Justice observed redness and tears inside J.S.'s

genitalia and testified that J.S.'s injuries were consistent with sexual assault. The records from Sierra Medical Center and Nurse Justice's testimony regarding J.S.'s statements were admitted in evidence over Appellant's objections.

Dr. Bryan's Testimony

Dr. Bryan testified that she was contacted by J.S's daughter regarding her mother.[4] Dr. Bryan explained that in order to treat patients for intervention and trauma, she has to know what happened to them in order to know where to take the treatment to and to know what to do with the patients. After two extensive sessions with J.S., Dr. Bryan diagnosed J.S. with Posttraumatic Stress Syndrome (PTSD). The root cause of J.S.'s PTSD was the rape. J.S. told Dr. Bryan that a man, who she later recognized as someone who had provided physical therapy to her at another facility, came into her apartment, threw her on the bed, took off her clothes, and raped her. Dr. Bryan worked with J.S. to detox her of the trauma from the rape. Dr. Bryan's records and testimony regarding J.S.'s statements were admitted over Appellant's objections.

We conclude that the records and testimony from Nurse Justice and Dr. Bryan did not violate

[4] Karen Meister, J.S.'s daughter, testified that after the sexual assault, her mother was unhappy and withdrawn. Meister hired Dr. Bryan to help her mother.

Appellant's confrontation rights because J.S.'s statements were not testimonial, but rather her statements were made for medical diagnosis and treatment. The primary purpose of the statements made to Nurse Justice and the SANE exam were to allow Nurse Justice to evaluate J.S., formulate a diagnosis, and provide care. After Nurse Justice obtained J.S.'s history, she was able to administer the appropriate antibiotic for treatment of possible sexually-transmitted diseases. Similarly, Dr. Bryan acquired J.S.'s history for purposes of treating her for intervention and trauma. With the information J.S. provided to Dr. Bryan during their counseling sessions, Dr. Bryan was able to diagnosis and treat J.S. for PTSD.

The records and statements J.S. made to Nurse Justice and Dr. Bryan were made with a primary purpose of medical diagnosis and treatment, and not criminal investigation thus, they are nontestimonial in nature. *See Melendez-Diaz*, 557 U.S. at 312 n.2; *Berkley*, 298 S.W.3d at 715; *see also Lollis*, 232 S.W.3d at 808-10 (finding statements made by children to counselor were nontestimonal because statements were made during course of treatment for behavioral problems and abuse issues). Accordingly, we conclude that the trial court did not violate Appellant's confrontation rights by admitting the complained-of evidence. *See Lollis*, 232 S.W.3d at 809-10; *see also Morrison v. State*, No. 2-05-443-CR, 2007 Tex. App. LEXIS 1529, 2007 WL 614143, at *4 (Tex.App. – Fort Worth Mar. 1, 2007, pet. ref'd) (mem. op.) (not designated for publication) (child's statements to SANE

during exam held to be nontestimonial because purpose of SANE exam was to ascertain whether child had been sexually assaulted and needed treatment). Issue One is overruled.

APPELLANT'S RECORDED STATEMENTS TO POLICE

In Issues Two and Three, Appellant challenges the admission of his recorded statements to police. In Issue Two, Appellant contends that the trial court erred by admitting the two recorded statements he made to police because the State failed to establish that he voluntarily waived his rights as required by article 38.22 of the Code of Criminal Procedure. In Issue Three, Appellant asserts that he was deprived of a fair trial because the trial court admitted his invocation of the right to counsel.

Standard of Review

We review a trial court's ruling on a motion to suppress using the bifurcated standard articulated in *Guzman v. State,* 955 S.W.2d 85 (Tex.Crim.App. 1997). *See Carmouche v. State*, 10 S.W.3d 323, 327 (Tex.Crim.App. 2000); *Krug v. State*, 86 S.W.3d 764, 765 (Tex.App. – El Paso 2002, pet. ref'd). We do not engage in our own factual review because at a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony. *See State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App.2000);

Romero v. State, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990). We give almost total deference to the trial court's ruling on (1) questions of historical fact and (2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Johnson v. State*, 68 S.W.3d 644, 652-53 (Tex.Crim.App. 2002); *Best v. State*, 118 S.W.3d 857, 861-62 (Tex.App. – Fort Worth 2003, no pet.). We review *de novo* a trial court's rulings on mixed questions of law and fact if they do not turn on the credibility and demeanor of witnesses. *Johnson*, 68 S.W.3d at 652-53. If the trial court's ruling on the admissibility of a custodial statement turns on an evaluation of credibility and demeanor, we are not at liberty to disturb any finding which is supported by the record. *See Dewberry v. State*, 4 S.W.3d 735, 747-48 (Tex.Crim.App. 1999). Generally, we only consider the evidence adduced at the suppression hearing; however, where, as here, the parties relitigate the suppression issue at the trial on the merits, we consider all the evidence, from both the pretrial hearing and the trial, in our review of the trial court's ruling. *See Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex.Crim.App. 2007).

Article 38.22

In Issue Two, Appellant argues that because the record before us is devoid of an express waiver of Appellant's rights, the State failed to establish that Appellant knowingly, intelligently, and voluntarily waived his rights. Article 38.22 proscribes the admissibility of oral statements made during custodial

interrogation unless (1) those statements were recorded and (2) prior to making the statements but during the recording, the accused was warned of his rights and knowingly, intelligently, and voluntarily waived those rights. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (West 2005). Those warnings include that:

> (1) [the accused] has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
>
> (5) he has the right to terminate the interview at any time[.]

Id. at 38.22, § 2 (West 2005).

In *Joseph v. State*, the Court of Criminal Appeals reiterated "'that neither a written nor an oral express waiver is required'" before a statement is admissible under the mandates of article 38.22 of the Code of Criminal Procedure. 309 S.W.3d 20, 24 (Tex.Crim.App. 2010) (quoting *Watson v. State*, 762 S.W.2d 591, 601

(Tex.Crim.App. 1988)); *see Barefield v. State*, 784 S.W.2d 38, 40-41 (Tex.Crim.App. 1989) (noting that the oral confession statute does not require an "express verbal statement from an accused that he waives his rights prior to giving the statement"), *overruled on other grounds, Zimmerman v. State*, 860 S.W.2d 89, 94 (Tex.Crim.App. 1993); *State v. Oliver*, 29 S.W.3d 190, 192 (Tex.App. – San Antonio 2000, pet. ref'd) (noting that there is no "additional language . . . required before a trial court could infer the defendant had waived his rights pursuant to art. 38.22"). Rather, that waiver may simply be "'inferred from the actions and words of the person interrogated.'" *Joseph*, 309 S.W.3d at 24-25 (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)). But that waiver must still be knowingly, intelligently, and voluntarily made. *Id*. We look at the totality of the circumstances in reaching the voluntariness of a confession. *See Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *Barefield*, 784 S.W.2d at 41. In reviewing the totality of the circumstances, we may consider the defendant's background, experience, and conduct. *Joseph*, 309 S.W.3d at 25 (citing *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

We are not persuaded by Appellant's argument that in light of the absence of an express waiver of his rights, the State failed to establish that Appellant knowingly, intelligently, and voluntarily waived his rights because, as noted above, an explicit waiver of rights is not required. *See id.* at 24; *Oliver*, 29

S.W.3d at 192. The record shows that Appellant read his *Miranda* warnings aloud from a card on three different occasions. While at the police station, Appellant agreed to give two recorded statements, and after reading his *Miranda* rights both times, he indicated that he understood his rights. At the suppression hearing, Detective Hicks testified that Appellant was not coerced or threatened into giving a statement and explained that after Appellant read his rights, Appellant continued speaking with the detectives.[5] At trial, Appellant testified that he read and signed the *Miranda* warnings card, and told the detectives that he understood his rights. However, he explained that he forgot to tell detectives that although he understood what he was reading, "[it was not] sinking in." Appellant also agreed that during his first recorded statement, he told the detectives that he wanted to know what the allegation against him was so that he could decide if he wanted to continue talking to them or if he wanted to get a lawyer. Appellant continued talking to the detectives and later terminated that first recorded interview by stating "if that's the allegation, then, you know, I don't have any other choice but to talk to a lawyer. Get me a lawyer." Detective Aguirre testified at both the suppression hearing and trial that after the termination of the first recorded interview, Appellant reinitiated contact with Detective Aguirre by motioning to him while Appellant was

[5] At trial, Detective Aguirre similarly testified that Appellant voluntarily agreed to give a recorded statement.

in the holding cell and told him that he wanted to plead guilty to consensual sex.

In its findings of fact and conclusion as to voluntariness, the trial court found that: Appellant read his rights aloud from a *Miranda* warning card while being transported to the police station and again during the first and second interviews; after the detectives explained the nature of the allegation to Appellant, Appellant answered all of the detectives' questions; at the end of the interview, Appellant invoked his right to counsel and all questioning ceased; Appellant later reinitiated contact with Detective Aguirre, provided a second statement in which he answered all of Detective Aguirre's questions, and admitted that he engaged in consensual sex with J.S. The trial court concluded that: (1) Appellant was under arrest and in custody when Appellant gave the two recorded statements to police, (2) Appellant intentionally, knowingly, and voluntarily waived his rights during the first and second statements, and (3) both statements made by Appellant complied with the provisions of article 38.22 of the Code of Criminal Procedure.

We conclude that the trial court's findings are supported by the record. In applying the appropriate standard of review to this case, we accord almost total deference to the trial court's determination regarding the credibility and demeanor of the witnesses. *See Johnson*, 68 S.W.3d at 652-53; *Best*, 118 S.W.3d at 861-62; *Oliver*, 29 S.W.3d at 191. Looking at the totality of the circumstances, we hold that the trial

court did not err by concluding that Appellant knowingly, intelligently, and voluntarily waived his rights under article 38.22. *See Turner v. State*, 252 S.W.3d 571, 583 (Tex.App. – Houston [14th Dist.] 2008, pet. ref'd) (concluding defendant's rights were validly waived where he indicated he understood his rights and proceeded to answer questions); *Hargrove v. State*, 162 S.W.3d 313, 318-19 (Tex.App. – Fort Worth 2005, pet. ref'd) (finding the defendant validly waived his rights despite a lack of explicit waiver); *Oliver*, 29 S.W.3d at 193 (defendant knowingly, intelligently, and voluntarily gave a statement, despite lack of explicit waiver, where he indicated he understood his rights and proceeded to discuss details of murder with police). Issue Two is overruled.

Invocation of Appellant's Right to Counsel

In Issue Three, Appellant asserts that he was deprived of a fair trial because the trial court admitted his invocation of the right to counsel.

Right to Counsel

Once a suspect invokes his right to counsel, interrogation must cease until counsel has been provided, or the accused himself initiates further communication. *Minnick v. Mississippi*, 498 U.S. 146, 151-52, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). A request for counsel must be unambiguous, meaning the suspect must "articulate his desire to

have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Not every mention of a lawyer is sufficient to invoke one's Fifth Amendment right to counsel during an interrogation. *State v. Gobert*, 275 S.W.3d 888, 892 (Tex.Crim.App. 2009). If the suspect's statement is not an unambiguous or unequivocal request for counsel, the police officers do not have to seek clarification or much less stop questioning the suspect. *Id*. Whether a suspect has unequivocally requested an attorney depends on whether he expressed a definite desire to speak to someone, and that person be an attorney. *Dinkins v. State*, 894 S.W.2d 330, 352 (Tex.Crim.App. 1995). When reviewing alleged invocations of the right to counsel, we look at the totality of the circumstances surrounding the interrogation, as well as the alleged invocation, to determine whether a suspect's statement can be construed as an actual invocation of his right to counsel. *Dinkins*, 894 S.W.2d at 351; *Castillo v. State*, 742 S.W.2d 1, 4 (Tex.Crim.App. 1987).

The State cannot inform the jury that the accused invoked his constitutional rights because the jury can improperly consider the invocation as an inference of guilt. *Hardie v. State*, 807 S.W.2d 319, 322 (Tex.Crim.App. 1991). Nevertheless, where the suspect subsequently waives his previously invoked right, there is no error. *See Campbell v. State*, No. 04-08-00193-CR, 2009 Tex. App. LEXIS 5781, 2009 WL

2265472, at *4 (Tex.App. – San Antonio July 29, 2009, pet. ref'd) (mem. op.) (not designated for publication) (holding trial court did not err by admitting appellant's recorded statement which included his initial invocation of the right to counsel where he later waived that right).

We first review the record to determine whether Appellant's comments were a clear and unequivocal invocation of his right to counsel. The record demonstrates that prior to Appellant's interrogation by Detectives Hicks and Aguirre, Appellant spoke to his spouse on his cell phone in the presence of the detectives. During this time, the recording system in the interview room was turned on and Appellant's cell phone conversation was recorded. While on the phone, Appellant asked his spouse to get information about legal prepay. After Appellant hung up the call, he commented: "Let me see if we can get a lawyer or something, because I don't like the way this is going." Afterwards, Appellant's cell phone rang and Appellant then asked his spouse to call the lawyer. The detectives commenced the interview by having Appellant read a *Miranda* warning card aloud and asking him if he understood his rights. Appellant indicated that he understood his rights. At the suppression hearing, Detective Hicks testified that when she and Detective Aguirre first walked into the interview room, Appellant was on the phone and that was when he first mentioned an attorney. Appellant did not request an attorney at that time. According to Detective Hicks, Appellant did not invoke his right to counsel

until the very end of the first recorded statement. On cross-examination, Detective Hicks stated that she heard Appellant make the "Let me see" statement, but explained that she did not consider that to be a request for an attorney. She stated that if Appellant had requested an attorney at that time, they would have stopped the interview. She further explained that Appellant did not request an attorney, but mentioned trying to obtain one.

At trial, on cross-examination, Detective Aguirre maintained that Appellant was not trying to obtain an attorney when he made the "Let me see" comment. He clarified that Appellant's statement was not directed to them, but rather Appellant was questioning himself as to whether he should get an attorney.

The State argues that the trial court did not err in admitting the statements Appellant made during his telephone conversation with his spouse because those statements did not constitute a clear and unequivocal invocation of his right to counsel. We agree. In *Dalton v. State*, the Austin Court of Appeals concluded that the appellant's statement to the police officer to ask or tell his friends to get him a lawyer was not an invocation of the right to counsel. 248 S.W.3d 866, 873 (Tex.App. – Austin 2008, pet. ref'd), *cert. denied*, 558 U.S. 1013, 130 S.Ct. 555, 175 L.Ed.2d 386 (2009). The *Dalton* court held that, at most, the appellant's statement was an "equivocal and ambiguous statement that he might want the services of an attorney at some point." *Id*. Like *Dalton*, Appellant's "Let me see" statement is not an

unequivocal and unambiguous invocation of his right to counsel, but, at most, recounted Appellant's telephone conversation and indicated that he wanted to see if he could get an attorney at some point. *See id*. After Appellant made the statement, he answered his cell phone and asked his spouse to call the lawyer. Appellant then read his *Miranda* rights, indicated he understood them, and told the detectives that he wanted to know what the allegations were before deciding whether he wanted to get an attorney. In the context presented, Appellant's statement was ambiguous and equivocal and would not reasonably have been construed as a request for an attorney. *See Davis*, 512 U.S. at 459, 462 (holding suspect's statement, "Maybe I should talk to a lawyer," was not a request for an attorney); *Huckaby v. State*, No. 2-01-301-CR, 2003 Tex. App. LEXIS 4565, 2003 WL 21235588, at *5 (Tex.App. – Fort Worth May 29, 2003, pet. ref'd) (not designated for publication) (concluding that the phrase "I will call my attorney" after appellant agreed to be photographed "was more an after-the-fact expression" of appellant's discomfort with being photographed and his desire not to speak further with police than an invocation of the right to an attorney).

A review of the totality of the circumstances surrounding the interrogation, the telephone conversation between Appellant and his spouse, and the comments Appellant made, indicate that Appellant did not clearly and unambiguously invoke his right to counsel. *See Dinkins*, 894 S.W.2d at 351.

Appellant also argues that the invocation of his right to counsel at the beginning of the first recorded statement and at the end of that same recording, were tantamount to post-arrest silence and that the admission of those recorded statements in evidence violated his due process rights. In *Garcia v. State*, the defendant argued that the trial court abused its discretion by overruling his objection to the State's comments on his right to remain silence in violation of his Fifth Amendment right. 126 S.W.3d 921, 923-24 (Tex.Crim.App. 2004). The Court of Criminal Appeals rejected defendant's argument as "nonsensical" because he had "waived his post-arrest right to silence when he agreed to give a written statement to police after being warned of his constitutional rights." *Id*. at 924. In other words, a defendant's post-arrest silence cannot improperly be commented upon when defendant did not remain silent. *Salazar v. State*, 131 S.W.3d 210, 215 (Tex.App. – Fort Worth 2004, pet. ref'd).

Appellant's argument is based on the premise that he remained silent after invoking his constitutional rights. However, Appellant does not dispute that he voluntarily reinitiated contact with Detective Aguirre after he terminated the first interview. Because Appellant waived his rights by reinitiating contact with Detective Aguirre, the complained-of statements by Appellant were not tantamount to post-arrest silence. *See Garcia*, 126 S.W.3d at 924; *Salazar*, 131 S.W.3d at 215. The trial court's finding that following Appellant's invocation of his right to

counsel at the end of the first recorded statement, Appellant reinitiated contact with Detective Aguirre and agreed to give a second recorded statement is supported by the record. Accordingly, we conclude that (1) Appellant did not clearly and unambiguously invoke the right to counsel at the beginning of the recorded statement, and (2) he later waived that right by reinitiating contact with Detective Aguirre. Thus, the trial court did not abuse its discretion in admitting Appellant's recorded statements. *See Torres v. State*, 71 S.W.3d 758, 760 (Tex.Crim.App. 2002) (we review trial court's decision to admit or exclude evidence for abuse of discretion); *Campbell*, 2009 WL 2265472, at *4. Issue Three is overruled.

REFORMATION

Finally, we note that the written judgment incorrectly indicates that Appellant pleaded "guilty" to charged offense. However, the record reflects that Appellant entered a plea of "not guilty" at trial. We have the authority to reform a judgment to make the record speak the truth when the matter has been called to its attention by any source. *See* TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). Further, we may act *sua sponte* to reform an incorrect judgment and may have a duty to do so. *Asberry v. State*, 813 S.W.2d 526, 530 (Tex.App. – Dallas 1991, pet. ref'd); *see French*, 830 S.W.2d at 609. Accordingly, we reform the judgment to reflect Appellant's plea of "not guilty" to the charged offense.

CONCLUSION

Having overruled Appellant's issues, we affirm the trial court's judgment as reformed.

SERGIO HERRERA v.
The STATE of Texas, Appellee

PD-1590-13

COURT OF CRIMINAL APPEALS OF TEXAS

424 S.W.3d 52*; *2014 Tex. Crim. App. LEXIS 262

February 26, 2014, Decided

COUNSEL: For APPELLANT: Henry J. Paoli, ScottHulse PC, El Paso, TX.

For THE STATE: District Attorney El Paso County, Jaime Esparza, El Paso, TX.

JUDGES: CONCURRING STATEMENT JUDGE COCHRAN

OPINION

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW REFUSED

CONCUR BY: COCHRAN

CONCUR

COCHRAN, J., filed a statement concurring in the refusal of the petition.

I agree with the Court's decision not to review appellant's petition for procedural reasons, but I believe that the legal issue that appellant raises is an

important one that this Court should address in a suitable case. Appellant's ground for review reads:

> Is the admission of testimony of a sexual assault nurse examiner concerning statements made by the alleged victim, in a case in which the victim does not testify and is unavailable for cross-examination, a violation of the Confrontation Clause of the 6th Amendment to the Constitution, as held by the majority of authorities in Texas's sister states?

The evidence in this case showed that the 85-year-old rape victim was a resident in an assisted-living facility. Appellant had previously provided physical therapy services to her in the facility. One night he walked into the victim's room when no one else was present and sexually assaulted her, leaving her bleeding and with cuts and bruises. The next morning, the victim was taken to Sierra Medical Center for examination by a Sexual Assault Nurse Examiner (SANE). As a part of her examination, the SANE said that she wrote down the victim's account of the event:

> This event happened last night in the patient's room in assisted living. Male came into her room and . . . slammed her door open. Patient was sitting on the couch watching TV. . . . "He said I was too skinny and needed to fatten up." . . . He kept putting his hand on her shoulder and made her get up and patted her butt. He forced her over to the bed. He made her lay down on it and he

> was taking his britches off all the time. "He raped me."

Appellant's DNA was found in a sperm sample taken by the SANE. The elderly victim died of an unrelated illness before trial and thus was unavailable as a witness.

At trial, appellant testified that he went to the victim's room to chat. She was naked, and she pulled down his pants and began to fondle him. She pushed him back on the bed and then forced him to have sex with her.[1]

Appellant objected to the introduction of the SANE report, which was offered as a business and medical record,[2] and he specifically objected to the victim's testimonial statements, citing *Crawford*[3] and relying on his Sixth Amendment Right of Confrontation.

The court of appeals upheld the admission of the SANE's testimony and records repeating the victim's

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[1] Appellant had originally told the police that he did not touch the elderly lady, but later he said that he had consensual sex with her.

[2] The State relied on TEX. R. EVID. 803(4) (hearsay exception for statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

[3] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

account of the rape, concluding that the account was a nontestimonial statement.[4] In this Court, appellant includes copies of numerous out-of-state decisions concluding that out-of-court statements to SANES were testimonial in nature and thus inadmissible unless the declarant testified at trial.[5]

This is an important constitutional issue, and our decision to refuse appellant's petition should not be read to foreclose consideration of this same issue in a different case.

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[4] *Herrera v. State*, No. 08-11-00193-CR, 2013 Tex. App. LEXIS 11569, 2013 WL 4859311, *4 (Tex. App. – El Paso Sept. 11, 2013) ("The records and statements [victim] made to Nurse Justice . . . were made with a primary purpose of medical diagnosis and treatment, and not criminal investigation thus, they are nontestimonial in nature.") (not designated for publication).

[5] Those decisions include *State v. Bennington*, 293 Kan. 503, 264 P.3d 440 (Kan. 2011), *State v. Romero*, 2007 – NMSC013, 141 N.M. 403, 156 P.3d 694 (N.M. 2007); *People v. Spangler*, 285 Mich. App. 136, 774 N.W.2d 702 (Mich. Ct. App. 2009); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008); *People v. Vargas*, 178 Cal. App. 4th 647, 100 Cal. Reptr. 3d 578 (Cal. Ct. App. 2009); *Medina v. State*, 122 Nev. 346, 143 P.3d 471 (Nev. 2006), *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007).