

FILED
SUPREME COURT
STATE OF WASHINGTON
11/20/2019 12:36 PM
BY SUSAN L. CARLSON
CLERK

NO. 96783-1

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

RONALD DELESTER BURKE,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitener

No. 14-1-04008-5

**SUPPLEMENTAL BRIEFING FOR MOTION FOR
DISCRETIONARY REVIEW**

MARY E. ROBNETT
Prosecuting Attorney

Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

TABLE OF CONTENTS

I. ARGUMENT 1

 1. The court of appeals' decision is in conflict
 with *State v. Scanlan*. 1

 B. Even after *Scanlan*, this case presents a
 significant Confrontation Clause question. 2

II. CONCLUSION 8

TABLE OF AUTHORITIES

State Cases

State v. Burke, 6 Wn. App. 950, 431 P.3d 1109 (2018)..... 5, 6, 7, 9

State v. Scanlan, 193 Wn.2d 753,
445 P.3d 960 (2019)..... 1, 2, 3, 4, 5, 6, 7, 8, 9

Federal and Other Jurisdiction

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

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266,
165 L. Ed. 2d 224 (2006)..... 7

Giles v. California, 554 U.S. 353, 128 S. Ct. 2678,
171 L. Ed. 2d 488 (2008)..... 4

Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143,
179 L. Ed. 2d 93 (2011)..... 2, 4

Ohio v. Clark, 567 U.S. 50, 135 S. Ct. 2173,
192 L. Ed. 2d 306 (2015)..... 2, 3, 4, 8, 9

Stuart v. Alabama, ___ U.S. ___, 139 S. Ct. 36, 37,
202 L. Ed. 2d 414 (2018)..... 2

Ward v. State, 50 N.E.3d 752, 761 (Ind. 2016)..... 3

Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221,
183 L. Ed. 2d 89 (2012)..... 2, 4, 5, 6, 7, 8, 9

Rules and Regulations

RAP 13.4(b)(1) 1

Other Authorities

Int'l Ass'n of Forensic Nurses, (available at
<http://www.forensicnurses.org/?page=whatisfn>)
(last visited February 19, 2016) 3

I. ARGUMENT

1. The court of appeals' decision is in conflict with *State v. Scanlan*.

In *State v. Scanlan*, 193 Wn.2d 753, 755, 445 P.3d 960 (2019), this Court held that a crime victim's statements to his medical providers were nontestimonial because they were not made with the primary purpose of creating an out-of-court substitute for trial testimony. The victim's statements to his care providers were made days and weeks after the assault and identified the assailant. *State v. Scanlan*, 2 Wn. App. 2d 715, 723-24, 413 P.3d 82 (2018). The care providers inquired about the perpetrator of the victim's injuries in order to keep him safe. *Scanlan*, 193 Wn.2d at 769 ("all testified that they were concerned about patient safety and that one of their purposes in speaking with patients is to help ensure the patient has a safe place to go after discharge."). This Court observed that, as a threshold matter, a victim's statements "are significantly less likely to be testimonial than statements given to law enforcement officer" because medical personnel are "not principally charged with uncovering and prosecuting criminal behavior." *Scanlan*, 193 Wn.2d at 767.

In our own case, the crime victim's statement was made to a sexual assault nurse examiner (SANE) the same day as the assault. The victim was homeless. She did not identify the assailant. He was identified years later by DNA testing after the victim had passed away. Yet the court of appeals reversed the conviction, holding that the statements made in the SANE interview were testimonial under the primary purpose test. This holding conflicts with *Scanlan*. Review is appropriate under RAP 13.4(b)(1).

B. Even after *Scanlan*, this case presents a significant Confrontation Clause question.

After *Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012) and *Ohio v. Clark*, 567 U.S. 50, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015), United States Supreme Court Confrontation Clause jurisprudence remains opaque.¹ That opacity persists after *Scanlan*.

The primary purpose analysis in *Scanlan* was resolved largely by application of *Clark* to the facts of that case. *Scanlan*, 193 Wn.2d at 767-770. This Court, in *Scanlan*, could rely upon *Clark* because in *Scanlan*, the interactions of the nurse, the doctors, the physician’s assistant, and the social worker were all directed toward providing medical care during the conversations at issue. *Scanlan*, 193 Wn.2d at 755-58. In *Clark* the interactions of the preschool teachers were directed toward teaching when an immediate concern arose to protect a vulnerable child who needed help. *Clark*, 135 S. Ct. at 2181. *Clark* provides no template for resolution of this case, because the interaction between Nurse Frey and K.E.H. was heterogeneous by design, not homogeneous like the interactions in *Scanlan*.

The conversations in *Clark* and *Scanlan* had a purpose, so it was appropriate to examine “the” purpose of those conversations for Confrontation Clause analysis. When a medical conversation has multiple

¹ See *Stuart v. Alabama*, ___ U.S. ___, 139 S. Ct. 36, 37, 202 L. Ed. 2d 414 (2018) (Gorsuch, J. and Sotomayor, J., dissent on denial of certiorari). The Confrontation Clause cases certainly have cast a “mantle of uncertainty over future criminal trials” *Crawford v. Washington*, 541 U.S. 36, 70, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (Rehnquist, J., and O’Connor, J. concurring in the judgment).

purposes, the appropriate legal standard is unclear and an opinion from this Court is needed. In *Clark*, the Supreme Court noted that “there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.” (quotation omitted) *Clark*, 135 S.Ct. at 2180. This references a statement. *Id.* However, the Supreme Court followed that sentence with: “The existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry. Instead, whether an ongoing emergency exists is simply one factor that informs the ultimate inquiry regarding the primary purpose of an interrogation.” (emphasis added, ellipsis, braces, and quotations omitted) *Clark*, 135 S. Ct. at 2180. Since only one “statement” was involved in *Clark* (a report of abuse to a teacher), the meaning of one interrogation was coextensive with the meaning of one statement. This case is not so homogeneous.

A nurse will not give anything primacy over medical care. Forensic nurses are *nurses* first and foremost, even though they are also specially trained in injury identification, evaluation, and documentation. *Int'l Ass'n of Forensic Nurses*, (available at <http://www.forensicnurses.org/?page=whatisfn>) (last visited February 19, 2016).

(quotation marks omitted) *Ward v. State*, 50 N.E.3d 752, 761 (Ind. 2016). In *Scanlan* the only conversational purpose was medical care. *Scanlan* provides no clarity when a medical conversation is intertwined with a forensic conversation. This Court has noted “that the United States Supreme Court has consistently said in dicta that statements made to

medical providers for the purpose of obtaining treatment have a primary purpose that does not involve future prosecution and that such statements are therefore nontestimonial.” *Scanlan*, 193 Wn.2d at 767 (citing *Giles v. California*, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)). It does not make sense that statements made to a medical provider for the purpose of obtaining treatment should be constitutionally inadmissible only because they were made in temporal proximity to testimonial statements.

Bryant accorded primacy to the emergency response purpose of the interrogation of a murder victim by law enforcement. *Id.*, 562 U.S. at 344. It provides only general guidance on how the primary purpose test applies to a conversation with medical providers. *See Scanlan*, 193 Wn.2d at 767-70. But the existence of an ongoing emergency is not the touchstone of the inquiry. *Clark*, 135 S.Ct. at 2180. The pertinent question is whether the “statement” was procured with the primary purpose of responding to the emergency. *Clark*, 135 S.Ct. at 2180.

The unresolved concerns presented above are displayed in stark relief when this case is viewed in light of *Williams*. The Court of Appeals’ decision in this case reconciles with neither the four justice plurality opinion, nor the concurring opinion, nor the dissenting opinion in *Williams*. *Scanlan* provides no additional clarity.

The four judge plurality in *Williams* held that admission of a DNA report did not violate the Confrontation Clause. It was outcome determinative that the statement in question “plainly was not prepared for

the primary purpose of accusing a targeted individual.”² *Williams*, 567 U.S. at 84. The interaction between Nurse Frey and K.E.H. was likewise unconcerned with “accusing a targeted individual.”³ However, the Court of Appeals did not consider that fact as a non-testimonial purpose in *State v. Burke*, 6 Wn. App. 950, 969-70, 431 P.3d 1109 (2018). Quite to the contrary, the Court of Appeals found the following fact indicated that K.E.H.’s statement was testimonial: “In fact, K.E.H. agreed to stay in the hospital for several hours specifically so Frey could examine her because K.E.H. did not want her attacker ““to be out there doing this to someone else.”” *Burke*, 6 Wn. App. 2d at 970. That failure to properly consider a relevant non-testimonial purpose would not conform with the plurality opinion’s test in *Williams*.

At the time of her examination, K.E.H.’s rapist was still at large and K.E.H. remained homeless.⁴ The Court of Appeals’ opinion suggests that nevertheless, the emergency had terminated. *Burke*, 6 Wn. App. at 969-70. The Court of Appeals gave no weight at all to the medical concerns related to K.E.H.’s ongoing safety and placement issues. *Burke*, 6 Wn. App. at 968-71. Those ignored safety issues merit consideration, as *Scanlan* notes. *Scanlan*, 193 Wn.2d at 768-69. In this case, the only reason Nurse Frey did

² The holding was an alternative holding. The other alternative basis was that the report was not admitted for the truth of the matter asserted, and that the Confrontation Clause only applies to a subset of statements admitted for the truth of the matter asserted. *Williams*, 567 U.S. at 57-58.

³ Defendant was identified years later. 8 VRP 874. K.E.H. only provided the most basic description of the man who raped her. 6 VRP 614. K.E.H. at the time of her forensic examination was also motivated “[b]ecause [she did not] want him to be out there doing this to someone else.” Exhibit 19F. In other words, K.E.H. wanted her rapist caught.

⁴ 6 VRP 614 (vague description); Motion Exhibit 19A (homelessness).

not provide help to K.E.H. upon her admission to the hospital was because she was helping another patient with a “really complicated” case. 6 VRP 544. Like the medical providers in *Scanlan*, Nurse Frey’s purpose, or purposes, remained constant.⁵

The concurrence in *Williams* would abandon the primary purpose test altogether because the “primary purpose test gives courts no principled way to assign primacy between emergency response and establishing facts about a crime for potential prosecution.” *Williams*, 567 U.S. at 114. That problem is starkly presented in this case because the primary purpose test gives courts no principled way to assign primacy between medical care and establishing facts about a crime for potential prosecution.

Nothing in the record supports the proposition that the sexual assault nurse examiner’s role as evidence gatherer had primacy over her role as caregiver. The evidence best supports the inference that neither purpose had primacy over the other.⁶ Nevertheless, the Court of Appeals felt bound to find “the” primary purpose of the conversation. *Burke*, 6 Wn. App. 570. If no one aspect of a conversation has factual primacy over any other aspect of the conversation, then it is error to assign a primary purpose to that conversation. Not every conversation has a primary purpose. If a conversation shifts purpose, or if a conversation has multiple intertwined threads, the reviewing court should address the conversational elements

⁵ “But even for the later follow-up care at Virginia Mason, it seems implausible that the primary purpose of his interactions was to create an out-of-court substitute for trial testimony.” *State v. Scanlan*, 193 Wn.2d at 769-70.

⁶ In describing her job, Nurse Frey did not emphasize the forensic piece over the medical piece and did not emphasize the medical piece over the forensic piece. 6 VRP 545-46

separately.⁷ *Scanlan* does not assist in this analysis because the same primary medical purpose informed every statement in *Scanlan*.

The rule announced by the Court of Appeals in this case would also be rejected by the dissent in *Williams* because it is so manipulable. The indivisible conversation approach of *Burke* could have been avoided by splitting Nurse Frey's conversation with K.E.H. into three separate conversations.⁸ The first conversation could concern medical care with no substantial criminal justice aspect. The second conversation could also concern medical care, but it would touch on subjects with a criminal justice aspect. The third conversation could relate to the crime itself, along with evidence gathering.⁹ Such an artificial approach would pass muster under the Court of Appeals' test. The first conversation would definitely have a primary medical purpose; the second conversation probably would have a primary medical purpose; the third conversation would be testimonial. Such a different result from the outcome in this case would obtain just because the process was manipulated. The dissent in *Williams*, vigorously eschewed a manipulative Confrontation Clause jurisprudence.

The Court of Appeals' Confrontation Clause analysis can be characterized as a "what is the conversation more like" inquiry, rather than

⁷ The concurrence in *Williams* does point out the inadequacies of the primary purpose test, but the concurrence's "solution" to this problem is (as the *Williams* dissent points out) a "constitutional geegaw." *Id.*, 567 U.S. at 140.

⁸ Such conversation-splitting would not be possible in the emergency response situation presented by *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) because officers who have the time to carefully divide a conversation for Confrontation Clause purposes would no longer be responding to an emergency.

⁹ Litigation over how these hypothetical discrete conversations must be separated would be both absurd and tragic, because a rape victim's welfare is at stake.

a “primary purpose” inquiry. Imagine a hypothetical conversation in *State v. Scanlan*, where the doctor purposefully asks one pure criminal investigation question. Under the Court of Appeals’ analysis, the admission of that testimonial statement would not violate the Confrontation Clause because the primary purpose of the conversation was for medical care. That is unsatisfactory. But such a problem is not easily fixed if conversations are indivisible: It would also be unjust if a whole series of admissible statements are tainted simply because the conversation includes one testimonial exchange between nongovernmental actors. *Scanlan* did not need to address the rule applicable in such cases because the same medical purpose, with the same intensity, applied to each statement.

The concept of the sexual assault nurse examiner is a very good thing, even though later it may require reviewing judges to apply a more demanding Confrontation Clause analysis. Combining medical treatment and evidence gathering can get the rape victim through a traumatic process with as little additional trauma as possible.

II. CONCLUSION

This case presents a conversation involving distinctly heterogeneous conversational threads, unlike the homogeneous conversational threads of *Scanlan* and *Clark*. Any attempt to derive the primary purpose of the conversation as a whole is bound to fail because no one conversational purpose has primacy over any other. That absence of primacy—getting all

these important things done—is the central idea behind the sexual assault nurse examiner concept.

Clark and *Scanlan* fit the primary purpose test because the conversations in question had a homogeneous purpose. The conversation at issue in this case had multiple purposes and cannot square with *Williams*.

This case involves a significant Confrontation Clause question because neither trial courts nor appellate courts have sufficient guidance necessary to evaluate the sexual assault nurse examiner's interaction with the patient / victim. *Scanlan* does not provide that guidance because the relevant statements were all expressed with the same primary purpose. *Williams* demonstrates that the existing federal guidance is insufficient to make up the difference.

Alternatively, *Burke* conflicts with *Scanlan*.

This Court should accept review of this case.

RESPECTFULLY SUBMITTED this 20th day of November,
2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

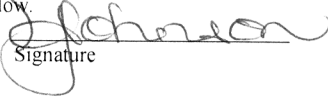


Mark von Wahlde WSB# 18373
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1/20/19
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 20, 2019 - 12:36 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96783-1
Appellate Court Case Title: State of Washington, Respondent v. Ronald D. Burke, Appellant
Superior Court Case Number: 14-1-04008-5

The following documents have been uploaded:

- 967831_Briefs_20191120123525SC145042_2618.pdf
This File Contains:
Briefs - Petitioners Supplemental
The Original File Name was Burke Supp Brief--Petitionre.pdf

A copy of the uploaded files will be sent to:

- SCCAttorney@yahoo.com
- maureen.goodman@piercecountywa.gov
- pcpatcef@co.pierce.wa.us

Comments:

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

Filing on Behalf of: Mark Von Wahlde - Email: mvonwah@co.pierce.wa.us (Alternate Email: PCpatcef@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7875

Note: The Filing Id is 20191120123525SC145042