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No. 96783-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RONALD DELESTER BURKE,

Respondent,

**BRIEF OF WACDL AS AMICUS CURIAE OBO RESPONDENT,
RONALD DELESTER BURKE**

From the Court of Appeals, State of Washington No. 50053-1-II

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Ronald Delester Burke (Burke). WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has around 1,000 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

II. ISSUE OF CONCERN TO AMICUS

Whether the Confrontation Clause precludes a sexual assault nurse examiner from testifying to an alleged victim's statements made during a forensic examination, particularly when the forensic examination was bifurcated from provision of medical treatment by other medical professionals.

III. ARGUMENTS AND AUTHORITY

The practice of introducing surrogate testimony, in which a testifying witness relays to the jury what was told to her by a non-testifying alleged victim or other witness, poses serious problems because

it fundamentally alters the structure of a criminal trial, hampers its truth-seeking function, and ultimately threatens the integrity of our criminal justice system. In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, courts have routinely wrestled with the question of whether the Confrontation Clause permits various forms of surrogate testimony. But this Court need not wade into the grey areas of this sometimes-difficult question in this case given the clear distinction between the provision of medical treatment and forensic examination.

The alleged victim's visit to the emergency room was neatly bifurcated into two stages handled by different professionals serving different roles: a medical treatment stage handled by a registered nurse and a physician and a forensic stage handled by Kay Frey (Frey), a sexual assault nurse examiner (SANE). More than four hours elapsed between these two stages, during which time the alleged victim (KEH) was medically cleared from the ER, stated that she would wait for the SANE in order to aid efforts to apprehend the perpetrator, and signed a consent form agreeing to a "forensic evaluation" involving the collection of evidence to be relayed to law enforcement. The SANE examination was then billed to Washington's crime victims compensation program (CVCP), which billing is authorized by statute only "when such

examination is performed for the purposes of gathering evidence for possible prosecution.” RCW 7.68.170.

Under the facts presented here, the Court of Appeals correctly held that gathering evidence was the primary purpose of the SANE forensic examination and that KEH’s statements to the SANE nurse were barred from admission by the Confrontation Clause. To hold otherwise would be to create precisely the chaos and confusion the State insists exists under the current state of Confrontation Clause jurisprudence.

A. The “Primary Purpose” Test is Firmly Established in U.S. Supreme Court Jurisprudence and Easily Applied in this Case.

The State argues that the record does not support the conclusion that gathering evidence was Frey’s primary purpose, that “the appropriate legal standard is unclear” for addressing the issues presented, and that there is “no principled way to assign primacy between medical care and establishing facts about a crime for potential prosecution.” Supp. Br. for Motion for Discretionary Review (Nov. 20, 2019) at 2-3, 6; State’s Supp. Br. (Feb. 3, 2020) at 8-10. As elaborated herein, these positions are untenable, irreconcilable with the facts presented, and in violation of controlling jurisprudence and the basic promise of the Confrontation Clause.

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. Amend. VI., cl. 2. Thus, the Sixth Amendment guarantees a defendant’s right to confront witnesses who “bear testimony” against him. *Crawford*, 541 U.S. at 51. This right is rooted in centuries-old English Common Law. *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696).

For many years, the test for whether an out-of-court statement violated a defendant’s confrontation right largely tracked the hearsay rules, focusing on the reliability of the statement. *Ohio v. Roberts*, 448 U.S. 56, 66–67 (1980). *Crawford* changed the analysis. Under *Crawford*, out-of-court statements are flatly barred if they are “testimonial,” unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 68–69. If a statement is not testimonial, it does not implicate the Confrontation Clause. *Giles v. California*, 554 U.S. 353, 376 (2008).

As for what is “testimonial,” the *Crawford* court did not set the outer limits of that term, but it did hold that it applies not only to in-court testimony, but also to any other “solemn declaration or affirmation made for the purpose of establishing or proving some fact” related to a criminal prosecution. *Crawford*, 541 U.S. at 51–52, 68. Such statements include not only “[s]tatements taken by police officers in the course of interrogations”,

but also other statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Id.*

Over time, the Supreme Court has given further guidance to create a roadmap for determining whether a statement is testimonial. The Court set forth the test for such statements in *Davis v. Washington*: Statements are testimonial when the circumstances objectively indicate that the primary purpose of the questioning is “to establish or prove past events that are potentially relevant to a later criminal prosecution.” 547 U.S. 813, 822 (2006). Applying these principles, a recording of a 911 call describing an ongoing domestic disturbance was nontestimonial in *Davis*, because the victim’s “elicited statements were necessary to be able to resolve [the ongoing] emergency,” and the statements were not formal. *Id.* at 827.

On the other hand, the statements at issue in *Hammon v. Indiana*, a companion case decided together with *Davis*, were testimonial because the victim was interviewed after the domestic disturbance in a room separate from her assailant and “deliberately recounted, in response to police questioning,” the past events. *Id.* at 830. Because at the time of the interrogation any emergency had ceased, “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.” *Davis*, 547 U.S. at 830.

In *Michigan v. Bryant*, the Court emphasized that under the primary purpose test, courts must evaluate the “circumstances in which the encounter occurs” (at the scene of the crime or later, during an ongoing emergency or afterwards) and the “statements and actions of the parties.” 562 U.S. 344, 359-60 (2011). It is the task of the court to determine “the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” *Id.* at 360. The *Bryant* Court emphasized that this analysis is objective and does not require the Court to discern the actual motives of the interrogator or declarant. *Id.* at 369.

More recently, in *Ohio v. Clark*, the Supreme Court again applied “what has come to be known as the ‘primary purpose’ test.” 135 S. Ct. 2173, 2180 (2015). There, a pre-school teacher noticed marks on her three-year-old student, who identified Clark as his abuser. *Id.* at 2177. Clark was arrested and, at his trial, prosecutors introduced the child’s statements without the child testifying. *Id.* The Court held that in light of “all the relevant circumstances,” the child’s statements “clearly were not made with the primary purpose of creating evidence for Clark’s prosecution.” *Id.* at 2181. The Court stressed the fact the child’s “statements occurred in the context of an ongoing emergency involving suspected child abuse.” *Id.* at 2181. The Court found there was “no

indication” the primary purpose of the interaction was to gather evidence for a future trial, noting the child, largely due to age, “never hinted that he intended his statements to be used by the police or prosecutors.” *Id.* The conversation, moreover, was “informal and spontaneous.” *Id.*

This Court synthesized and applied these rulings in a recent decision, stating:

[A] statement is testimonial if its primary purpose was “to establish or prove past events potentially relevant to later criminal prosecution,” “to investigate a possible crime,” “to create a record for trial,” or to “creat[e]” or “gather[] evidence for ... prosecution,” “In the end, the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.’”

State v. Scanlan, 193 Wn.2d 753, 767, 445 P.3d 960 (2019) (internal citations omitted). Contrary to the State’s protestations and requests that this Court disregard U.S. Supreme Court precedent as unworkable, the principles established by the U.S. Supreme Court and articulated in *Scanlan* are sufficiently clear and easily applied to the facts of this case.

1. KEH’s primary purpose in submitting to Frey’s examination was to provide evidence for arrest and prosecution.

Davis emphasized that “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” *Davis*, 547 U.S. at 822, n.1. *Bryant* similarly stated that the Court’s task is ultimately to ascertain “the understanding

and purpose of a reasonable victim in the circumstances of the actual victim” in light of the statements and actions of both speaker and listener. *Bryant*, 562 U.S. at 367, 367, n. 11, 369. Ignoring this language, the State largely disregards the statements and actions of KEH, instead focusing almost exclusively on Frey’s purported intentions. Objectively considering KEH’s statements and actions resolves the State’s objections and establishes that the primary purpose of the interaction between KEH and Frey was forensic, irrespective of any mixed motive Frey may have had.

The *Bryant* decision directly confronts and precludes the State’s argument that the primary purpose test is unworkable here due to Frey’s dual motives. Specifically, the *Bryant* Court stated that considering the statements and actions of both (or all) participants in the interaction “ameliorates problems that could arise from looking solely to one participant”, specifically the problem of “mixed motives.” *Bryant*, 562 U.S. at 368.

The facts of this case illustrate how looking at both participants resolves potential problems posed by one participant’s mixed motives. Even if Frey had mixed purposes (as elaborated below, she did not—her primary purpose was clearly forensic), there is no evidence whatsoever to suggest that KEH had mixed motives in meeting with Frey. To the contrary, having been medically cleared, KEH was effectively told that

she did not need further medical treatment at that time. See *State v. Burke*, 6 Wn. App. 2d 950, 431 P.3d 1109, 1111-14 (2018). She was then also told that, if she wished, she could wait for a forensic examination, i.e. an examination for “[u]se[] in or suitable to courts of law.” Forensic, Black's Law Dictionary (10th ed. 2014). By continuing to wait over four hours after being medically cleared and signing consent forms for a forensic examination, KEH made clear that she had no motive for meeting with Frey other than to provide evidence against her assailant. Indeed, she said as much, telling Frey she waited for the forensic examination “because I don’t want him to be out there doing this to someone else.” *Id.*

All the evidence indicates that KEH waited to see Frey for a forensic examination, not for additional medical treatment. In the formulation of *Crawford*, KEH’s statements to Frey four hours after she was medically cleared constituted “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”, and were thus testimonial. *Crawford*, 541 U.S. at 52; see *Bryant*, 562 U.S. at 369 (“The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim”).

2. Frey was acting primarily in her capacity as a forensic examiner for the State, rather than as a medical care provider.

The foregoing conclusion is strengthened further by assessing Frey's role in relation to law enforcement. The Supreme Court has suggested an individual conducting an interrogation for the police may be considered an agent of the police for purposes of confrontation analysis. *Davis*, 547 U.S. at 823 n.2 (considering acts of 911 operator to be acts of police for purposes of opinion); see *Bryant*, 562 U.S. at 359 n. 3 (statements may be testimonial even if made to someone other than a law enforcement officer). The purpose and structure of the SANE program in Washington demonstrates that Frey, like the 911 operator in *Davis*, was acting primarily in furtherance of the State's law enforcement interest in evaluating KEH.

Importantly, Frey testified that her services to KEH were not billed to KEH, but rather to the CVCP. *Burke*, 6 Wn. App. 2d 950, 431 P.3d at 1112 (citing 6 VRP at 558). This is highly significant because RCW 7.68.170 provides:

No costs incurred by a hospital or other emergency medical facility for the examination of the victim of a sexual assault, ***when such examination is performed for the purposes of gathering evidence for possible prosecution***, shall be billed or charged directly or indirectly to the victim of such assault. Such costs shall be paid by the state pursuant to this chapter.

(emphasis added). The Administrative Code further clarifies this statute, providing that the costs of a SANE examination “must be billed” to the CVCP “[w]hen a sexual assault examination is performed for the purpose of gathering evidence for possible prosecution.” WAC 296-30-170. The regulation further provides: “[i]f the examination includes treatment costs or the client will require follow-up treatment, an application for benefits must be filed with us for these services to be considered for payment.” WAC 296-30-170.

Pursuant to RCW 7.68.170 and WAC 296-30-170,¹ Frey’s act of billing the examination to the CVCP is an express admission that the examination was “performed for the purposes of gathering evidence for possible prosecution.” The Court of Appeals decision does not state whether Frey’s bill to the CVCP included an application for treatment costs. The details of the bill to CVCP could provide compelling evidence of the proportion of activity allocated to forensics versus medical care, but those details are not relayed in the Court of Appeals decision. In any event, by billing the CVCP, Frey represented that gathering evidence was

¹ This statutory scheme is required by the federal Violence Against Women Act. See Wash. Dep’t of Comm., *Sexual Assault Response: Increasing Sexual Assault Nurse Examiner Availability and Access Statewide* (Oct. 2019) (SANE Report) at 23.

not only *a* purpose of her interaction with KEH, but was in fact “*the purpose*” of her exam. RCW 7.68.170; WAC 296-30-170.

Several courts addressing this issue have concluded under similar circumstances that SANE nurses who conduct sexual abuse exams are acting as agents of law enforcement. *See, e.g., State v. Miller*, 293 Kan. 535, 264 P.3d 461, 488 (2011) (“the SANE was acting as an agent of law enforcement when performing the role of collecting evidence.”); *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009) (“The SANE nurse under KRS 314.011(14) is made available to ‘victims of sexual offenses,’ which makes the SANE nurse an active participant in the formal criminal investigation.”); *Medina v. State*, 122 Nev. 346, 143 P.3d 471, 476 (2006) (concluding SANE nurse “was a police operative” because she gathered evidence for prosecution). Courts reaching a contrary conclusion have done so under circumstances, unlike those present here, suggesting that the nurse acted with a primary medical treatment purpose or faced an ongoing emergency. *See, e.g., Scanlan*, 193 Wn.2d 753; *Ward v. State*, 50 N.E.3d 752, 760-64 (Ind. 2016); *United States v. Chaco*, 801 F.Supp.2d 1200, 1213 (D.N.M. 2011); *State v. Krasky*, 736 N.W.2d 636, 640-42 (Minn. 2007).

The capacity in which Frey acted in this case strongly suggests that her primary purpose was forensic, gathering evidence for prosecution,

rather than medical. Indeed, her actions in billing the examination to the CVCP is an admission that the exam was conducted “for the purpose of gathering evidence for possible prosecution.” WAC 296-30-170.

Moreover, to deem KEH’s statements non-testimonial on the basis of Frey’s purported mixed motives would set a precedent gravely imperiling Confrontation Clause protections. Any law enforcement officer conducting follow-up investigation into a serious alleged crime can testify that part of his motive in contacting an alleged victim is to ensure that she is safe and receiving appropriate medical care. Even a sincere expression of empathy, however, does not transform an inadmissible testimonial statement into an admissible hearsay statement.

3. The bifurcated manner in which KEH’s case was handled further supports a finding that her statements to Frey were testimonial.

Even if the statutory scheme and billing alone were deemed insufficient to establish that Frey was working as an agent of law enforcement to gather evidence for prosecution, the bifurcated manner in which KEH’s case was handled, in deviation from established best practices, establishes that Frey was acting primarily in her capacity as a forensic examiner.² See SANE Report at 5, 16. In the SANE Report to the

² This bifurcation between medical treatment and forensic examination materially distinguishes the facts of this case from those addressed in

Washington Legislature, the Department of Commerce describes the SANEs' role as follows: "SANEs provide immediate medical care, conduct forensic examinations and serve as expert witnesses if cases go to court." SANE Report at 16. The SANE Report also states as a matter of best practice that SANEs should be immediately contacted when a possible sexual assault victim arrives at the hospital and should arrive within an hour to "administer a forensic exam and ensure all medical concerns are addressed." SANE Report at 5.

In this case, it is indisputable that Frey did not provide "immediate medical care." Rather, registered nurse Carol Aquino-Smith and the treating physician provided immediate medical care, and Frey did not examine KEH until about 4:00 p.m., more than *fourteen* hours after she arrived at the ER and more than four hours after she was treated and medically cleared. *Burke*, 6 Wn. App. 2d at 952-55, 431 P.3d at 1111. Thus, of the three functions ascribed to SANEs in the SANE Report, Frey performed only the latter two, conducting a forensic examination and testifying in court, and did not conduct the first, provision of "immediate

Scanlan, 193 Wn. 2d 753. *Scanlan* is also materially distinguishable because, unlike in *Scanlan* where the victim knew and resided with the attacker, KEH did not know her attacker and there was no reason beyond pure speculation to believe that she was at risk of being re-attacked by her assailant.

medical care.” While the State protests that there was nonetheless a medical component to Frey’s examination, it is clear under the facts presented that Frey was primarily, if not solely, performing her role as a collector of evidence to aid law enforcement, given that other medical professionals had already provided medical treatment and medically cleared KEH from the ER hours before Frey became involved.

Several other courts have concluded that the primary purpose of an examination was forensic rather than medical where the treatment of the alleged victim was bifurcated in this manner. See *United States v. Bordeaux*, 400 F.3d 548, 555–56 (8th Cir.2005) (statements to forensic interviewer deemed testimonial, even if there was a secondary purpose, when comprehensive medical treatment provided separately by a physician); *United States v. Gardinier*, 65 M.J. 60, 65–66 (2007) (statements to sexual assault nurse during forensic medical examination a few days after the victim had been treated by other medical professionals deemed testimonial); *State v. Hooper*, 145 Idaho 139, 145, 176 P.3d 911 (2007) (child victim’s statements to a forensic interviewer working with law enforcement made after physician had first conducted medical examination of the victim were testimonial); *People v. Stechly*, 225 Ill.2d 246, 251–52, 870 N.E.2d 333 (2007) (child victim’s statements to a clinical specialist with the hospital’s child sexual abuse team were

testimonial where interviews and medical examinations took place in different rooms at different times); *State v. Cannon*, 254 S.W.3d 287, 303–06 (Tenn. 2008) (statements to sexual assault nurse were testimonial where ER medical professionals had examined and stabilized the victim before she spoke with the sexual assault nurse).

KEH did not wait hours after being medically cleared for Frey to provide additional medical treatment, and Frey did not examine KEH with the primary purpose of providing medical treatment. With comprehensive medical treatment having already been provided by Aquino-Smith and the physician, and given that KEH had already been medically cleared by the treating professionals, it is beyond reasonable dispute that KEH and Frey met for the primary purpose of conducting a forensic examination.

4. KEH’s statements were not made in the course of an ongoing emergency.

The existence of an ongoing emergency is “among the most important circumstances informing ‘the primary purpose’ of an interrogation.” *Bryant*, 562 U.S. at 361, 365. A statement made during an emergency situation in order to obtain immediate assistance is not likely testimonial. *Davis*, 547 U.S. at 822. A statement that explains “what happened” rather than “what is happening” is more likely to implicate confrontation issues. *Id.* at 830.

KEH's statements to Frey fourteen hours after her arrival in the ER were not made in the context of an ongoing emergency. In speaking with Frey, KEH described what happened, not what was happening. The State nonetheless argues KEH's statements are admissible because KEH expressed concern that her rapist remained at large and could assault another victim. This argument misinterprets *Davis*. In *Davis*, the ongoing emergency mattered because it bore on the declarant's evidentiary intent - it made the non-testifying witness' statements a "call for help against a bona fide physical threat" rather than a narrative of past criminal conduct designed to further a police investigation. 547 U.S. at 827.

By contrast, the fact that a dangerous offender is at large and needs arresting, even if an "emergency" in some sense, does not undermine the declarant's evidentiary intent. A particularly pressing criminal investigation is still a criminal investigation, and accusers who make statements to further it are "witnesses" under the Sixth Amendment. That an accusing witness gave a statement to help identify and apprehend a dangerous offender has never justified exempting it from the Confrontation Clause, and the State provides no authority so holding.

Only when the witness faces being placed directly back under the perpetrator's control upon termination of medical treatment, as in *Clark* and *Scanlan*, could it be argued that an ongoing emergency exists that

impacts the declarant's evidentiary intent. *Clark*, 135 S. Ct. at 2181 (child would be returned to abuser); *Scanlan*, 193 Wn.2d 753 (elderly man would be returned to abusive cohabiting girlfriend). In this case, on the other hand, there was no reason to believe that KEH would be reunited with her assailant, whom she did not know, upon departure from the hospital. To the contrary, she only expressed unspecified concern that the assailant may harm "someone else."

This conclusion is supported also by another relevant consideration: the type of weapon used in the commission of the crime. Specifically, the Court found it significant that a gun had been used in *Bryant* as distinguished from a knife in *Crawford* and fists and hands in *Davis* and *Hammon*. *Bryant*, 562 U.S. at 364. Here, there was no evidence that the assailant was armed and KEH was not critically injured, further undermining any assertion of an ongoing emergency.

B. The Court of Appeals Properly Treated All Statements KEH Made to Frey as Testimonial.

The State argues the Court of Appeals was required to conduct an individual assessment of each statement KEH made to Frey and was prohibited from holding that the entire conversation was testimonial. See State's Supp. Br. (Feb. 3, 2020) at 9 ("Document-by-document analysis or conversation-by-conversation analysis is simply insufficient for evaluation

under the Confrontation Clause”). The only authority the State cites for this proposition, *United States v. Rojas–Pedroza*, in fact holds otherwise. 716 F.3d 1253 (9th Cir. 2013).

In *Rojas–Pedroza*, a defendant argued, similar to the State here, that courts are required to take “a statement-by-statement approach to determining whether there is a Confrontation Clause violation.” *Id.* But the Ninth Circuit held that when a document is prepared “under circumstances objectively indicating that the primary purpose of the record is non-testimonial”, then the entire document is properly treated as non-testimonial. As a corollary to this holding, under circumstances objectively indicating that the primary purpose of a SANE examination is testimonial (as in this case), then all statements made in the course of that examination can properly be treated as testimonial.

Accordingly, the Court of Appeals properly held that all statements KEH made to Frey in the course of the forensic examination were testimonial because the primary purpose of that examination was to gather evidence of a crime.

C. The State’s Public Policy Arguments are Misplaced.

The State raises several policy considerations, arguing that criminal justice would be hampered by preventing SANEs from serving as surrogates to the victims. See, e.g., State’s Supp. Br. (Feb. 3, 2020) at 18.

As a preliminary matter, these concerns are overblown because the situation presented here in which the alleged victim died from other causes in the intervening years before trial is a rare one. But the Court need not evaluate the merits of the State’s public policy arguments because a constitutional command is precisely that—a mandate that cannot be set aside because of the consequent difficulties it places on the Government:

The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009). Therefore, the State’s policy arguments have no place in analyzing the issues presented.

IV. CONCLUSION

For the foregoing reasons, the Court of Appeals decision correctly applied the Confrontation Clause and should be affirmed.

Respectfully submitted this 11 day of March, 2020.

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