

No. 18-8379 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
OCT 26 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN ANTHONY DOBBS — PETITIONER
(Your Name)

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND COURT OF APPEALS OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN ANTHONY DOBBS
(Your Name)

CLEMENTS UNIT 9601 spur591
(Address)

Amarillo, Texas 79107-9606
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

BECAUSE SANE NURSE EXAMINATIONS HAVE EVOLVED INTO A DUAL MEDICAL
AND FORENSIC PURPOSE, HAVE THE STATEMENTS OBTAINED BECOME 'FACTUAL'
'TESTIMONIAL' FOR PURPOSES OF CRAWFORD?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

- reported at _____ N/A ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

- reported at _____ N/A ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- reported at _____ ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ N/A court appears at Appendix N/A to the petition and is

- reported at _____ N/A ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 9/26/2018. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of The Constitution of the United States as found in The Oxford Guide to UNITED STATES SUPREME COURT DECISIONS, second edition, pg 413.1999.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner plead not guilty to sexual assault of a child under 17 and was convicted by the jury. Counsel elected the judge asses punishment who,after finding the habitual counts true,sentenced him to seventy five years imprisonment.

Petitioner timely filed notice of appeal and the trial court certified Petitioners right to appeal. A Motion for new trial was not filed.Petitioners brief was filed on January 25,2018, and the Court subsequently overruled the issue presented.

REASONS FOR GRANTING THE PETITION

1) Petition should be granted pursuant to Tex.R.App.Pro.66.3(b) because the court of appeals has decided an important question of state law-i.e., the impact of the forensic nature of sane nurse examinations under Crawford and its progeny—that has not been, but should be, settled by this Court.

The Confrontation Clause and Crawford v. Washington was violated by permitting the SANE nurse to testify about statements made to her by the absent complainant. It is well known that in Crawford v. Washington, the United States Supreme Court held that a defendant's right to confrontation under the Sixth Amendment is violated when a witness is permitted to relate out-of-court "testimonial" hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. However, delineating the "testimonial" nature of statements is a continuously developing area of law because it is a relative inquiry that depends on the circumstance surrounding the statements.

Generally speaking, TEXAS COURTS have been very permissive in the admissibility of medical statements in the child sexual assault setting. This is especially true given the fact the majority of states and many FEDERAL COURTS find SANE examinations testimonial under Crawford and its progeny. TEXAS COURTS have held that statements for the purpose of medical diagnosis or treatment have a primary purpose other than the pursuit of a criminal investigation. However, this purely medical purpose has changed drastically in the last few years as law enforcement and SANE nurse examiners have coordinated their work in order to obtain forensic evidence for criminal prosecution.

Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354 1364 (2004)
Michigan v. Bryant, 562 U.S. 1359, 131 S.Ct. at 1156 Wall v. State, 184 S.W.3d 730 (Tex.Crim.App.2006)
U.S.vBarker, 820 F.3d 167 (5th Cir. 2016, cert denied)
see Dorsey v. Bbanks, 749 F. Supp. 2d 715, 751 (2010). Paruch, Deborah, Silencing the victims in child sexual abuse prosecutions: The Confrontation Clause and children's Hearings Statements Before and After Michigan v. Bryant, 28 Touro L.Rev. 85 (2012)

In this regard, the SANE nurse has partially become an arm of law enforcement obtaining forensic evidence for future use in court. Thus, the past tautological reasoning: that the hearsay exception-medical treatment purposes-predicates admissibility and provides the basis of constitutional validity, bears a deeper scrutiny, particularly in the context of SANE medical examinations. These particular medico/legal examinations have morphed into an organized, law enforcement directed, cooperation between the sexual assault examiner, the prosecution and the police invoking 6th confrontation protections.

THIS EXPANSION OF THE HEARSAY APPLICATION has not been followed by numerous courts and been criticized by many commentators. See *State v. Bennington* 293 Kan. 503 (2011) *Deputy Doctors: THE MEDICAL TREATMENT EXCEPTION* after *Davis v. Washington*, 43 Cal. W.L. Rev. 451, 472 (2007) *TESTING THE TESTIMONIAL CONCEPT AND EXCEPTIONS TO CONFRONTATION: A Little Child Shall Lead Them*, 82 Indiana L. Rev. 918, 978; *Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE* Sec. 442, at 464 (2d ed. 1994); *United States v. Turning Bear*, 357 F.3d 730 (8th Cir., 2004) (error to admit child statement to medical personnel); *United States v. Gabe*, 237 F.3d 954 (8th Cir. 2001) (error to admit 15 years old statements to doctor). The United States Department of Justice's description of SANE program: "the SANE or other medical personnel first assess the victim's needs for emergency medical care and ensure that serious injuries are treated. After the victim's medical condition is stabilized or it is determined that immediate medical care is not required, the SANE can begin the evidentiary examination." *People v. Spangler*, 285 Mich. App. 136, 149-150 (2009). The role of the SANE includes: Performing a physical examination on the victim, collecting evidence, treating minor injuries such as cuts/bruises, expert testimony regarding the forensic evidence collected, serving on SANE response team (SART), working closely with law enforcement agencies and the prosecutor's office, supporting the psychological needs of the victim. "Oxford English Dictionary Online Edition" (1989) defines forensic as "pertaining to, connected with, or used in courts of law." *Black's Law Dictionary*, 6th edition, (5th reprint, 1991), defines it as "belonging to courts of law." *Black's Law Dictionary*, 6th edition (5th reprint, 1991), the term "forensic medicine" is defined as "that science which teaches the application of every branch of medical knowledge to the purposes of law...to enable a court of law to arrive at a proper conclusion on a contested question affecting life or property."

In the instant case, the SANE examiner testified she was conducting not only a medical examination but an equally important forensic examination. The purpose was two-fold: medical treatment as well as forensicto establish past events and to obtain evidence to furthr a criminal prosecution. The SANE nurse testfied:

Q. [Defense Counsel] And in collecting this information that the SANE exam does, it's primarily twofold. One, as you put it very blatantly and the very first thing, this is done for medical purpose and medical diagnosis, is that correct?

A. [SANE NURSE] Thats correct.

Q. However, the entire process of the SANE exam is not all for medical diagnosis. Part of it actually forensic. Would you agree with that statement?

A. Thats correct, the evidence collection.

Q. Okay. And that evidence collection, evidence just in of itself, that word will be used later on where they find a match through DNA or through other biological medical links to someone could be used to further prosecute that person; is that correct?

A. Yes..

Q. Okay.

A. Or--or--

Q. Or exonerate-

A. -exonerate.

Q. And in doing so, that information that's collected both for medical purposes aswell as forensically, that information is provided to law énforcement; is that correct?

A. Correct.

Q. And you typically as SANE examiner, you work hand in hand with detectives and specifically with the district attourney here in Tarrnt County. So thatwould be here in Tarrant County; is that correct?

A. We--we see patients in multiple counties, so.

Q. Okay.

A. Yes, sir.

Q. But you work--you couple with and work with law enforcement as well as district attorneys, prosecutors all over; is that right?

A. Yes, and defense attorneys.

Defense counsel objected to SANE nurse being allowed to testify as to the hearsay statements of the complainant who did not testify. Counsel stated:

[Defense counsel] Judge, my objection is actually twofold in regards to the--the SANE exam and nurse's testimony, one is in and of itself, Judge, just the forensic nature of the SANE exam. Coupled with the partnership of law enforcement as well as the District Attorney's Office, it's forensic in nature, JUDGE. And so that being forensic in nature in and of itself makes it testimonial.

And my assertion goes to the confrontation clause of the Sixth Amendment of the United States as well the Texas Constitution. It's my understanding at this point the State is not intending to bring [the complainant] in here to testify, and without her coming in to testify, Judge, we don't have an opportunity to cross-examine and to confront this witness, which the constitution guarantees us a right to do.

There is information that's provided, it's--the courts cannot just give them a free-for-all just based on that one sentence at the beginning of this exam that this is made for purposes of medical diagnosis.

The latter part, even by their own admission, Judge, it's a two-part test, although they are collecting information to diagnose, primarily. And the reason that's it's set up in such a fashion, it is testimonial, it's going to be used forensically to prosecute. That's why--that's why it's here.

And based on the information of it being testimonial and that they're not bringing--or at this point have decided not to bring [the complainant] down here to testify, Judge, we're going to object to her testimony--testifying and the admission of the SANE exam based on it's testimonial in nature as well as the fact we will not have an opportunity to cross examine and confront our accuser in violation of the Sixth Amendment of the United States Constitution.

Based on this colloquy, the questioning by the nurse of the complainant served two primary purposes: medical and forensic. The circumstances surrounding the taking of the hearsay statements reveal a testimonial purpose. The forensic nature of her examination, with her duties coordinated with law enforcement and the prosecutors bespeak a testimonial purpose. The statements were made under circumstances which would lead any objective person to reasonably believe they would be available for use at a later trial. They were made in a completely structured environment to a nurse with a specific and specialized forensic medical training.

As the nurse stated, she works with law enforcement and prosecutors, is specifically certified by the Attorney General, obtains forensic evidence to provide to law enforcement and her interviews are very structured as to content and question with an eye toward prosecution. Thus, SANE examination is one geared for the preparation, collection, evaluation and disposition of evidence, and all medical treatment provided is relative to the patient being a victim of a sexual crime. This purpose exists "in concert" with the very things that make a statement obtained thereby "testimonial".

All of these circumstances indicate that the interviewer's primary purpose, or at least equal to her medical purpose, was to establish past events to further a criminal prosecution. Simply because the statements may have a dual purpose, does not diminish their testimonial nature. The dual purpose is what makes these kinds of statements so dangerous and readily manipulated by police. It allows testimonial statements to be smuggled into court under the guise of a non-testimonial hearsay rationale resulting in the desecration of Confrontation protections.

For all these reasons, the evidence was testimonial and the appellate court erred in finding otherwise. The jury was allowed to convict Petitioner for this sexual assault through the second hand, hearsay testimony of the SANE nurse and without the ability to confront the complainant. Such procedure offends every protection promised by the Confrontation Clauses of the Texas and United States Constitutions. *Re: v. 10*

Review of this issue is needed by this Court to address this question of law in the context of the SANE nurse's evolved role as a forensic examiner and an arm of law enforcement.

See SANE Examinations Are Testimonial and Are Subject to Confrontation, Johnathan Ball, Voice for the Defense, October 25, 2012.

See DeLaPaz, 273 S.W.3d at 680.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John Anthony Dotts
Date: October 22, 2018