No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

THERESA SCANLAN,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

NANCY PATRICIA COLLINS
Counsel of Record
WASHINGTON APPELLATE PROJECT
1511 THIRD Avenue, Suite 610
Seattle, WA 98101-1688
(206) 587-2711
nancy@washapp.org

QUESTION PRESENTED

When police officers repeatedly inform an accuser that his statements to medical personnel will be given to the police and prosecuting authorities for use in a pending prosecution, are these statements testimonial under the Confrontation Clause of the Sixth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Theresa Scanlan respectfully petitions for a writ of certiorari to the Washington Supreme Court in *State v. Scanlan,* No. 95971-4.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 193 Wn.2d 753, 445 P.3d 960 (Wash. 2019), and is attached at App. A. The opinion of the Washington Court of Appeals is published at 2 Wn. App. 2d 715, 413 P.3d 82 (Wash. App. 2018), and is attached at App. B. The Court of Appeals denied a motion for reconsideration on May 5, 2018; the unpublished order is attached at App. C. The relevant order of the trial court is unpublished.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on August 1, 2019. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

1. Theresa Scanlan's accuser, Leroy Bagnell, refused to testify against her at the trial in which she was accused of assaulting him and keeping him from leaving his own home. 11/18/2015 Report of Proceedings (RP) 689. After declining to testify at Ms. Scanlan's trial, Mr. Bagnell came to the sentencing

hearing following her conviction and tried to explain to the judge that he did not believe Ms. Scanlan meant him harm and he was able to leave his home during the incident. 12/18/2015 RP 1678. The judge told Mr. Bagnell the sentencing hearing was not the forum for him to talk about whether Ms. Scanlan should have been convicted. *Id*. The judge sentenced Ms. Scanlan, a 59-year-old woman with no prior criminal convictions, to a term in prison.

2. The trial testimony about the alleged incident came from different medical personnel who interviewed Mr. Bagnell in the days and weeks after Ms. Scanlan's arrest. The trial court admitted this testimony under the hearsay rule for statements made for purposes of medical treatment, Wa. R. Rev. ER 803(a)(4),[1] and expressly rejected a confrontation clause challenge. 11/10/2015 RP 272-317; 11/18/2015 RP 633-71, 683-87; 11/19/2015 RP 802.

3. Mr. Bagnell's adult-aged children also testified at trial. His children had called the police when they came to Mr. Bagnell's home and found him with bruises on his body. His children acknowledged that Mr. Bagnell is unusually prone to bruising due to medications he took as well as the effects of age. They were not present when the incident took place.

4. Three weeks before this incident, the police came to Mr. Bagnell's home after someone called 911 but hung up. Because Mr. Bagnell looked bruised and Ms. Scanlan did not, the police arrested her. 6RP 728-29. At this

[1] Wa. R. Rev. ER 803(a)(4) exempts out of court statements from the rule excluding hearsay, regardless of the declarant's availability, if "made for purposes of medical diagnosis or treatment . . . ."

time, the police obtained Mr. Bagnell's written permission to collect his medical records as part of the State's "investigation and any resulting prosecution." 11/18/2015 RP 635-36; Exs. 9 10. The police asked him to sign a form authorizing the "Federal Way Police Department, and/or the offices of the King County Prosecutor and/or the Federal Way City Attorney" to access his medical records for one year for any information pertaining to his injuries. *Id.*

Following the second incident, Mr. Bagnell signed two additional, identically worded, written authorizations permitting the police and prosecution unfettered access to his medical information from the medical center where he received regular treatment from his primary care doctor as well as the hospital where he went to the emergency room.

Ms. Scanlan was charged with assault for both the first and second incidents, but the court dismissed the first assault charge at the end of the prosecution's case due to a lack of evidence.

5. Ms. Scanlan argued in the trial and appellate courts that her right to confront her accuser was violated by the prosecution's reliance on Mr. Bagnell's out of court statements to medical personnel made over several weeks, and when he was fully informed the police and prosecution would access and use his statements to these medical professionals.

6. The Washington Supreme Court affirmed the Court of Appeals decision that Mr. Bagnell's statements were not testimonial and therefore did not implicate the Sixth Amendment. App. A at 14-17; App. B at 13-14.

REASONS FOR GRANTING THE WRIT

In *Crawford v. Washington,* 541 U.S. 36, 68 (2004), this Court ruled an accused person's constitutional right to confront witnesses against her at trial prohibits the prosecution from using out-of-court accusations as a substitute for live testimony.

The right to confrontation has long required that criminal accusations are leveled in "a public and solemn trial," where cross-examination can occur and the jury has "an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 William Blackstone, Commentaries on the Laws of England 373-74 (1768); Matthew Hale, The History of the Common Law of England 164 (Charles M. Gray ed. 1713) (confrontation right requires "personal appearance and Testimony of Witnesses"). Because "cross-examination is the most powerful instrument known to the law in eliciting truth or in discovering error in statements made in chief," using an absent witness's out of court allegation for thier truth works "an injustice to the defendant." *State v. Eddon*, 8 Wash. 292, 301-02, 36 P. 139 (1894).

As *Crawford* explained, the Sixth Amendment's confrontation clause prohibits the prosecution from using a "testimonial" out-of-court statement at

trial, unless the accused already had the opportunity to confront that person and the speaker is unavailable to testify. 541 U.S. at 68. Merely satisfying the admissibility test for a hearsay rule does not fulfill the requirements of the confrontation clause. *Id*. at 61.

No definitive rule governs whether a statement is testimonial under the confrontation clause. *See Crawford*, 541 U.S. at 68; *Davis v. Washington*, 547 U.S. 813, 823 (2006). As a general rule, the prosecution must show, objectively, that a reasonable person in the declarant's shoes would not understand the statement would be memorialized and available for use by prosecuting authorities, considering the totality of the circumstances. *Michigan v. Bryant*, 562 U.S. 344, 360 (2011); *Crawford*, 541 U.S. at 52.

Medical personnel often serve dual roles, by not only treating a person's injuries, but also purposefully documenting the person's explanations of events to provide evidence to the police and prosecution. And people speaking to medical personnel may be expressly informed their statements to medical professionals will be used in a pending prosecution. This overlap implicates the confrontation clause when the prosecution relies on an absent accuser's out-of-court statements to prove its case and merits this Court's review.

A. *Ohio v. Clark* Does Not Answer Whether Statements to Medical Personnel are Testimonial under the Sixth Amendment's Confrontation Clause When the Accuser is Aware of his Statement's Prosecutorial Purpose.

In *Ohio v. Clark*, _ U.S. _, 135 S. Ct. 2173 (2015), this Court held that a three-year old's statement to his daycare provider about who injured him was not testimonial under the totality of the circumstances. The Court emphasized the statement was from a "very young child," made in an "informal and spontaneous conversation" that was "primarily aimed at identifying and ending the threat" posed to the child, and there was no indication of potential police involvement when the child spoke to his teacher. 135 S. Ct. at 2181. No one told the child, or even "hinted," that the information would be conveyed to the police. *Id*. The conversation "was nothing" like the formal police interview in *Crawford* or on-the-scene questioning in *Davis*. *Id.*

Clark also examined historical evidence to determine whether the testimony violated the confrontation clause. *Id*. at 2182. It found similar statements of a young child to his teachers about abuse were regularly admitted at trial under the common law roots of the Sixth Amendment's confrontation clause, because children were not considered capable of understanding the oath and were not competent to testify. *Id*.

Clark focused on a child-teacher relationship and noted that mandatory reporting laws requiring teachers to tell authorities about a crime

against a child do not turn all conversations between child and teacher into a police mission to gather evidence for the State. *Id*. at 2183. The *Clark* Court did not address statements to medical personnel or look at the historical roots of a statement to a health care professional under the confrontation clause. *See, e.g., State v. Florczak*, 76 Wn. App. 55, 68-70, 882 P.2d 199 (WA App. 1994) (young child's statement to a health care professional not admissible for reasons of diagnosis but admissible if sufficiently trustworthy under former Sixth Amendment analysis).

Clark refused to limit testimonial statements to those made to governmental officials. *Id*.at 2181. While statements to law enforcement are more likely to be testimonial, statements to others may violate the confrontation clause. *Id*.

Furthermore, *Clark* rested on the emergency timing of the questioning. Where time has passed, and there is no longer an emergency, efforts by the police to get more information from an accuser are more likely to be testimonial, even when those statements are obtained in the course of treatment. *McCarley v. Kelly*, 801 F.3d 652, 665 (6th Cir. 2015).

Courts "are divided" on whether statements made to medical personnel in the course of a pending criminal investigation are testimonial. *Thompson v. State*, 438 P.3d 373, 377 (Ok. Ct. App. 2019), *cert. denied*, _ U.S. _, 2019 WL 4922003 (2019) (listing division of state and federal courts).

A number of courts will examine criteria such as the extent an accuser may understand potential governmental involvement. *See, e.g.*, *People v. Spangler*, 774 N.W.2d 702, 709-13 (Mich. App. 2009) (collecting cases and listing criteria for testimonial nature of statement to nurse performing forensic examination); *State v. Miller*, 264 P.3d 461, 487 (Kan. 2011) (same); *State v. Ward*, 50 N.E.3d 752, 763-64 (Ind. 2016) (applying fact-specific test to hospital's own informed consent form). For example, a child victim's statements to a nurse are testimonial when they "were not clearly for the purpose of diagnosis and treatment, such as [the accuser's] description about where the assault happened, what [the perpetrator] was wearing," and other wrongful conduct the accused committed. *Ramirez v. Tegels*, __F. Supp. __, 2019 WL 4721033, *9 (W.D. Wis. 2019).

But other courts strictly construe the primary purpose test to assess the "interviewer's primary purpose," which is typically to treat the person medically, without regard to what either the accuser or the medical staff know about the prosecutorial use of notes and recorded conversations. *State v. McLaughlin*, 786 S.E.2d 269, 282 (N.C. App. 2016); *State v. Carmona*, 371 P.3d 1056, 1065 (N.M. App. 2016) (explaining sexual assault nurse examiner collects hearsay statements by accuser for non-testimonial medical purpose).

This division among state and federal courts requires this Court's review. *Clark* did not resolve this important question for a non-testifying adult accuser who makes statements to medical staff with an understanding

of their connection to a criminal case as a mechanism for gathering evidence. 135 S.Ct. at 2181, 2183. These statements are formalized, recorded after the emergency has passed, and are conveyed to police following the accuser's express permission. *Id.* In these circumstances they may amount to a substitute for testimony that violates the confrontation clause.

B. This Case is a Good Vehicle to Address the Testimonial Nature of Statements Police Collect from Medical Personnel When the Accuser Decides Not to Testify or Submit to Cross-Examination

The confrontation clause does not rest on the questioner's purpose. *Bryant*, 562 U.S. at 360 ("the subjective intentions of the interviewers are not proper considerations"). Instead, courts look to "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.*

The narrowest definition of "testimonial" includes questions asked by police officers who are investigating a reported crime. *Davis*, 547 U.S. at 831-32. But statements do not need to be made to directly to police officers to be testimonial. Statements to a 911 operator are testimonial when conveying information about a completed crime in response to question. *Davis*, 547 U.S. at 828-29 (after perpetrator left scene and 911 operator posed "battery of questions," accuser's statements became testimonial).

Casual remarks to a friend are not testimonial when no reasonable person would believe they had any bearing on prosecutorial proceedings against the accused. *Crawford*, 541 U.S. at 51. But answers to questions

posed by a therapist are testimonial when the police are involved in arranging the counseling session. *McCarley*, 801 F.3d at 665.

In this case, Mr. Bagnell was told by the police that the "assigned detective" and "prosecuting attorney" could obtain "a complete copy of all records, charts, notes, reports, memoranda, correspondence, comments" and any other materials kept by medical staff.

Each "Federal Way Police Department Waiver Form" reinforced Mr. Bagnell's status as "the victim of a reported crime" and emphasized this crime was "being investigated by the Federal Way Police Department." *Id.* Each form gave the State access to materials "in furtherance of the investigation and any resulting prosecution." *Id*.

Rather than bringing Mr. Bagnell to court, the prosecution relied on people who did not witness the incident who said what they thought Mr. Bagnell told them. Facing only ex parte descriptions of events from Mr. Bagnell, Ms. Scanlan could not challenge the medical providers' claims about what caused his injuries. *See Eddon*, 8 Wash. at 302 (because testimony repeating a person's statement increases "chances of misunderstanding just what was said, or intended to be said, or meant" by speaker, dying declaration should not be substitute for live testimony). As a result, the prosecution presented an unreliable accounting of the incident and left Ms. Scanlan unable to effectively challenge the claims leveled against her.

This case is a good vehicle for addressing a commonly occurring confrontation clause issue that is left unsettled after *Clark* and remains a pressing issue with divergent interpretations by courts nationally.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of October, 2019.

NANCY PATRICIA COLLINS
Counsel of Record
WASHINGTON APPELLATE PROJECT
1511 Third Avenue
Suite 610
Seattle, WA 98101
(206) 587-2711
nancy@washapp.org