

No. _____

**In the
Supreme Court of the United States**

STEVEN M. VICARIO,

Petitioner,

v.

STATE OF OHIO,

Respondent.

**On Petition for a Writ of Certiorari to the
Ohio Fifth District Court of Appeals, Delaware County**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Crawford v. Washington*, 541 U.S. 36 (2004), there is generally no Confrontation Clause violation if a hearsay declarant testifies at trial. But situations may arise where the defendant nonetheless did not have a meaningful opportunity to cross-examine the declarant. Here, the trial court delayed ruling on a motion in limine to exclude testimonial hearsay until after the declarant testified. The court then erroneously admitted the hearsay under the rules of evidence. Thus, at the time of the declarant's testimony, the defense did not know if the trial court would admit the hearsay and thus could not cross-examine her without introducing inadmissible hearsay.

The Question Presented Is:

Does the erroneous admission of testimonial hearsay under these circumstances deprive the defendant of a meaningful opportunity for cross-examination and thus violate the Confrontation Clause?

PARTIES TO THE PROCEEDINGS

Petitioner and Defendant–Appellant below

- Steven M. Vicario

Respondent and Plaintiff–Appellee below

- State of Ohio

LIST OF PROCEEDINGS

Ohio Supreme Court

No. 2026-0340

Citation: 2026-Ohio-1880

State of Ohio v. Steven Vicario

Order denying review: May 26, 2026

Ohio Fifth Appellate District, Delaware County

No. 25-CAA-030021

Citation: 2025-Ohio-5406

State of Ohio, Plaintiff-Appellee *v.*

Steven Vicario, Defendant-Appellant

Final Opinion: December 3, 2025

Court of Common Pleas, Delaware County, Ohio

No. 2024-CRI-040244

State of Ohio, Plaintiff *v.* *Steven Vicario*, Defendant

Judgment: February 10, 2025

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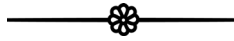
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OPINIONS BELOW

The opinion of the Ohio Fifth Appellate District, Delaware County was entered on December 3, 2025. App.2a. This decision affirmed the judgments of the Court of Common Pleas, Delaware County, Ohio, dated February 10, 2025. App.51a, 54a.



JURISDICTION

The Ohio Supreme Court denied jurisdiction on May 26, 2026. This petition is filed by its August 24, 2026 due date. This Court has Jurisdiction under 28 U.S. Code § 1257(a).



CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VI

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 defense.

U.S. Const., amend. XIV § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**STATEMENT OF THE CASE**

This case arises from an indictment returned in the Delaware County Court of Common Pleas, Delaware, Ohio, charging Vicario with multiple offenses stemming from allegations that he sexually assaulted his stepdaughter, V.M. This petition presents a question under the Sixth Amendment’s Confrontation Clause concerning whether a defendant receives a meaningful opportunity to confront a witness when the trial court delays ruling on the admissibility of the witness’ testimonial hearsay until after the witness has testified and been excused.

I. Material Facts

On November 3, 2023, V.M. underwent a forensic interview at Nationwide Children’s Hospital, conducted immediately after making the allegations. V.M. discussed the accusations during this interview, but her responses were hesitant and often required prompting

from the interviewer. Approximately five months later, V.M. made an unrelated accusation against her biological father, resulting in a second forensic interview on April 4, 2024. At the close of the second interview, forensic interviewer, Jamie Castro, questioned V.M. about her prior accusation against Vicario. In response, V.M. made additional statements, this time directly accusing Vicario of specific sexual misconduct.

Before trial, Vicario filed a motion in limine, seeking to exclude Castro's testimony about V.M.'s statements in the second forensic interview. The trial court delayed ruling until after trial began and after V.M. testified. The court then overruled the motion, thereby permitting Castro to repeat V.M.'s out-of-court statements made during the second forensic interview.

At the time of V.M.'s testimony, defense counsel did not know if the trial court would admit these statements. As such, Vicario found himself on the horns of an impossible dilemma. If he questioned V.M. about her prior statements in the second interview (which were inconsistent with her first interview), he would be introducing damaging evidence that might not otherwise be admitted. But if he risked waiting for a court ruling, he would lose the opportunity to confront V.M. during the normal course of the trial process. He chose the latter.

Notably, the Ohio Court of Appeals later determined the statements were inadmissible hearsay. But the court refused to find a confrontation violation because V.M. testified at trial and/or Vicario could have issued a subpoena and called her in his case-in-chief.

II. Procedural History

A. Trial Court—Delaware County Court of Common Pleas

A Delaware County Grand Jury indicted Vicario on three counts of rape in violation of Ohio Revised Code § 2907.02(A)(2), three counts of sexual battery in violation of Ohio Revised Code § 2907.03(A)(5), one count of tampering with evidence in violation of Ohio Revised Code § 2921.12(A)(1), and one count of gross sexual imposition in violation of Ohio Revised Code § 2907.05(A)(1). Before trial, the State dismissed the gross sexual imposition count.

The case proceeded to a jury trial in the Delaware County Court of Common Pleas. The State alleged that Vicario sexually assaulted his stepdaughter, V.M. Vicario maintained that V.M. fabricated the allegations.

The jury returned a mixed verdict, finding Vicario guilty of two counts of rape, two counts of sexual battery, and one count of tampering with evidence, while acquitting him on the remaining charges. The trial court imposed an aggregate indefinite prison term of 25 to 31½ years and classified Vicario as a Tier III sex offender. *Vicario*, 2025-Ohio-5406, ¶ 52.

B. Direct Appeal—Fifth District Court of Appeals for Delaware County, Ohio

Vicario appealed his convictions to the Fifth District Court of Appeals for Delaware County, Ohio, asserting seven assignments of error. As relevant here, Vicario argued that the trial court violated the Sixth Amendment’s Confrontation Clause by permitting Jamie Castro to testify regarding V.M.’s prior forensic interview. The Fifth District agreed that Castro’s testi-

mony was improperly admitted and did not qualify as statements for medical diagnosis or treatment under Ohio Evid. R. 803(4). *Vicario*, 2025-Ohio-5406, ¶ 114. The court nonetheless held that no Confrontation Clause violation occurred because “[n]othing prevented Vicario from questioning her about the April 4, 2024, forensic interview, nor did Vicario request to recall V.M. once Castro later described the interview.” *Id.* ¶ 107. The court further concluded that the error was harmless and affirmed Vicario’s convictions. *Id.* at ¶ 116.

Vicario timely moved for reconsideration, arguing that the court misapplied the Confrontation Clause and that it was no cure to recall V.M. during the defense case. The Fifth District denied reconsideration.

C. Discretionary Review — Ohio Supreme Court

Vicario timely sought discretionary review in the Ohio Supreme Court. The court denied jurisdiction.



REASONS FOR GRANTING THE PETITION

I. Introduction

The Sixth Amendment guarantees the accused has the right “to be confronted with the witnesses against him.” As Justice Harlan aptly put it, confrontation at trial is “essential for the due protection of life and liberty” *Kirby v. United States*, 174 U.S. 47, 56 (1899). The primary interest of the Confrontation Clause is the right of cross-examination, deemed “the ‘greatest legal engine ever invented for the discovery of truth.’” *California v. Green*, 399 U.S. 149, 158

(1970), quoting 5 J. Wigmore, *Evidence* § 1367, p. 29 (3d ed.1940).

Two distinct lines of confrontation authority have emerged. The first addresses a scenario where a trial court precludes a defendant from cross-examining a witness on a particular topic, such as bias or motive to lie. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 315–16 (1974). The second involves hearsay evidence at trial and its inherent relationship to the confrontation. *Crawford v. Washington*, 541 U.S. 36, 60–69 (2004) (abandoning the *Ohio v. Roberts*, 448 U.S. 56 (1980) reliability approach to confrontation and hearsay).

The facts of this case fall within both—the trial court effectively prevented counsel from cross-examining V.M. on her inconsistencies by delaying a ruling on the admissibility of her hearsay statements. Though she testified at trial, it was too late for meaningful cross-examination. She was absent for confrontation on her prior testimonial hearsay.

II. The Confrontation Conundrum at Vicario’s Trial

Before trial, Vicario moved to exclude Castro’s testimony concerning V.M.’s second forensic interview. Rather than rule on the motion before V.M. testified, the trial court expressly reserved its ruling until Castro was called as a witness. Faced with an unresolved evidentiary issue, trial counsel reasonably chose not to question V.M. about statements contained in the second forensic interview. Had counsel done so, he would have introduced the very evidence he sought to exclude and risked opening the door to otherwise inadmissible testimony.

Only after V.M. completed her testimony and was excused did the trial court deny the motion in limine and permit Castro to recount V.M.'s testimonial statements to the jury. At that point, the opportunity to confront V.M. regarding those statements had already passed.

At trial, V.M. testified that Vicario rubbed his penis against her vagina but denied penetration. She testified that she pretended to be asleep and did not say anything to Vicario during the incident. V.M. further testified that Vicario later penetrated her anus.

On cross-examination, Vicario's trial counsel challenged V.M.'s credibility by focusing on inconsistencies between her trial testimony and the statements she made during her first forensic interview. Counsel did not question V.M. about her second forensic interview. That would have resulted in the certain admission of the hearsay statements he sought to exclude.

In the second interview (in contrast to V.M.'s first interview and trial testimony), V.M. said Vicario penetrated both her vagina and anus. But that inconsistency did not emerge until after V.M. testified.

Had the trial court ruled on the admissibility of Castro's testimony about the second interview before V.M. testified, trial counsel could have confronted V.M. with that inconsistency during cross-examination. The delayed ruling therefore did more than create a theoretical limitation on cross-examination—it prevented Vicario from confronting V.M. with a substantive inconsistency bearing directly on vaginal penetration—a substantive element of the offense. While trial counsel questioned Castro about this inconsistency, that was hardly a substitute for direct confrontation of Vicario's accuser.

III. The Sixth Amendment Guarantees a Meaningful Opportunity to Confront and Cross-Examine the Declarant of Testimonial Hearsay Under Both Lines of Confrontation Clause Authority

A. The Trial Court Effectively Precluded Cross-Examination on V.M.'s Prior Inconsistent Statements by Delaying Ruling their Admissibility

This Court has long recognized that the Sixth Amendment requires a meaningful opportunity for cross-examination. In *Davis v. Alaska*, 415 U.S. 308, 315–18 (1974), the Court found a Confrontation Clause violation where the trial court prevented the defense from questioning a juvenile witness about his probationary status and potential bias. Likewise, in *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), the Court held that a trial court violated the Confrontation Clause by “cutting off all questioning about an event” from which the jury could have inferred that the witness had a motive to favor the prosecution.

These decisions establish that a declarant’s physical presence on the witness stand does not, by itself, satisfy the Sixth Amendment. The defendant must have a meaningful opportunity to cross-examine the declarant concerning the testimonial evidence ultimately presented against him.

By delaying its decision on the admissibility of V.M.’s second forensic interview, the trial court put Vicario in an impossible position. If he asked V.M. about her inconsistencies, he would be admitting the evidence he sought to exclude. If he did not ask her

about it, he was foregoing cross-examination on V.M.'s credibility by exposing her inconsistencies.

This was paramount to the situation addressed in *Davis* and its progeny. It is true that the court did not expressly prohibit cross-examination.¹ The judge put the impossible choice on Vicario, punishing him either way. In that regard, it was perhaps more dangerous than an express prohibition. The confrontation problem came disguised as routine procedure; a proverbial wolf in sheep's clothing. Either way the effect was the same. V.M. was not subjected to the rigors of cross-examination, leaving her credibility on that topic unchallenged.

B. The Admission of Testimonial Hearsay Violated Vicario's Right of Confrontation Even Though V.M. Testified at Trial

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court rejected the notion of "reliability" based assessment of hearsay evidence previously set forth in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). *Crawford* was clear that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.*, at 53–54.

For more than two decades since *Crawford*, this Court has consistently reaffirmed the core importance of cross-examination at trial, rejecting attempts to shift the burden of exercising the right onto the accused or to circumvent confrontation altogether.

¹ As addressed below, it was no remedy for Vicario to re-call V.M.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that under the Confrontation Clause, defendants have a right to cross-examine drug laboratory drug analysts in person. It was no longer sufficient for prosecutors to submit written “certificates of analysis” to establish drug weights and quantities. The Sixth Amendment requires live testimony, subject to cross-examination. *Id.* at 315. Significantly, the Court rejected the notion that the defense could have exercised the right of cross-examination by issuing its own subpoena for the analysts. “[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” *Id.* at 324.

The Court reaffirmed that principle in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). This time in the context of blood alcohol testing, the Court again held that the State could not avoid confrontation by presenting the testimony of a surrogate analyst in place of the analyst who performed the forensic testing. The state again argued that the defense could satisfy confrontation by calling the lab technicians in its own case or by performing its own testing. *Id.* at 666. As in *Melendez-Diaz*, this was not sufficient. “[T]he obligation to propel retesting when the original analyst is unavailable is the State’s, not the defendant’s.” *Id.*, referencing *Taylor v. Illinois*, 484 U.S. 400, 410, n. 14 (1988) (“Confrontation Clause’s requirements apply ‘in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own’”).

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Court addressed the same issues in the context of DNA testing. Though the Court determined surrogate DNA testimony violated the Confrontation Clause, it

was split on *why* the statements of non-testifying lab analysts were “testimonial.” *Id.* at 53.

Then, in *Smith v. Arizona*, 602 U.S. 779 (2024), the Court laid the “muddle” of the *Williams* plurality to rest. *Id.* at 789. The Court held that when a surrogate expert testifies to the details of forensic testing performed by an absent analyst, those underlying details are offered for their truth. Consequently, if the absent analyst’s lab notes or reports are testimonial, their introduction through a surrogate witness violates the Confrontation Clause unless the testing analyst is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 802-3

The Court in *Smith* did not address whether courts could satisfy confrontation by requiring the defense to subpoena and cross-examine non-testifying witnesses on its own accord. It did not have to, as that issue was firmly laid to rest in *Melendez-Diaz* and *Bullcoming*. It is nonetheless clear from *Smith* that confrontation would not tolerate that.

The Court has likewise rejected judicially created exceptions to the Confrontation Clause. In *Hemphill v. New York*, 595 U.S. 140 (2022), the Court held that there is no valid exception where the defense theory “opened the door” for otherwise non-admissible testimonial hearsay. The prosecution cannot admit testimonial hearsay to refute a defense theory that the declarant (not the defendant) committed the crime. *Id.* at 142.

The throughline of these decisions is clear. Confrontation requires actual face-to-face cross-examination. And courts cannot put the burden of exercising the Right of Confrontation on the defense by requiring it to procure the state’s witnesses on its own

accord. Nor can courts craft rules that would suspend confrontation where the defense employs a certain trial strategy that the prosecution cannot refute without resorting to testimonial hearsay. *Hemphill, supra*.

This case presents the next unanswered question. Unlike the prior cases, the constitutional injury did not arise from a surrogate analyst, an affidavit, or an expert's reliance on testimonial statements. It arose from the trial court's decision to delay ruling on the admissibility of testimonial hearsay until after the declarant had testified and been excused.

The Fifth District concluded that no constitutional violation occurred because Vicario could have recalled V.M. during the defense case-in-chief. Whether that proposed procedure comports with the Sixth Amendment is a question this Court has not yet addressed. But a similar argument failed in *Melendez-Diaz*, and it should fail here for the same reasons. 557 U.S. 305 at 324.

As in *Melendez-Diaz*, this would have required a defense subpoena for the state's key witness. "Unlike the Confrontation Clause, [state subpoena power and/or Compulsory Process] are of no use to the defendant when the witness is unavailable or simply refuses to appear." *Id.* citing *Davis v. Washington*, 547 U.S. 813, 820 (2006). There was no guarantee that the defense could procure V.M.'s attendance. It did not have her under subpoena, and as an alleged child victim, there was no easy access to her.

But beyond the undue onus and potential perils of subpoena power, calling V.M. in the defense case was no substitute for cross-examination at the time of her testimony. In the eyes of the jury, the time for questioning V.M. had passed, and the flow of cross-

examination was irreparably interrupted. If the defense called V.M. later, for more cross-examination, it would only leave the impression that Vicario was beating up on a child victim. And worse, the State would have had yet another opportunity to elicit testimony against Vicario, but this time using leading questions while it cross-examined V.M. (its own witness). And finally, there would still be no remedy for the underlying error—the second forensic interview was inadmissible testimonial hearsay.

Just as in *Melendez-Diaz*, requiring Vicario to call V.M. as his own witness to remedy the confrontation problem would shift all the adverse consequences of that to him. That would effectively punish him for exercising his right of confrontation.

C. The Linchpin Is That There Must Be a Meaningful Opportunity for an Effective Cross-Examination

The issue here falls somewhere between these two lines of authority. On the one hand, V.M. testified at trial and was present for cross-examination on other topics. But the procedural delay effectively precluded cross-examination on the damaging testimonial hearsay. Complicating the issue, the trial court's delayed decision to admit the second interview was erroneous and violated Ohio's hearsay rules.

The overriding principles and the historical context of confrontation provide an analytical solution. As this Court has recognized: “[a]lthough claims arising under the Confrontation Clause may not always fall neatly into one of these two categories, these cases reflect the Confrontation Clause’s functional purpose in ensuring a defendant an opportunity for cross-examination.”

Kentucky v. Stincer, 482 U.S. 730, 739 (1987) citing *Lee v. Illinois*, 476 U.S. 530 (1986).

The linchpin of all this is that at its core, the Confrontation Clause guarantees more than the physical presence of a witness on the stand. It guarantees a meaningful opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (the Confrontation Clause secures “an opportunity for effective cross-examination.”). To have any value, that opportunity must be meaningful considering the evidence ultimately presented to the jury. Vicario did not have that opportunity, even though V.M. testified at trial.

Under *Crawford*, it would be easy to conclude that the mere presence of a witness always satisfies confrontation. But, as this case exemplifies, that is not always the case. The real question is whether the core value of the Clause was satisfied. It may be that under *Crawford* it most often does. But such a rigid approach does not allow for cases that fall through the cracks in the middle. That is what happened here.

IV. Under the Proper Standard of Review, the Constitutional Error was Not Harmless

The question remains as to whether the error here was harmless. The Fifth District employed an incorrect standard of review, deeming the evidentiary error “nonconstitutional” and thus harmless: “After excising [the hearsay statements], the remaining evidence, including V.M.’s testimony, the first forensic interview, the PSANE examination, and DNA findings

independently establishes [sic] guilt beyond a reasonable doubt.” *Vicario*, 2025-Ohio-5406, ¶ 116.²

Under the proper standard of review, as set forth in *Chapman v. California*, 386 U.S. 18 (1967), the burden rests with the State, as the beneficiary of the constitutional error, to prove beyond a reasonable doubt that the error “did not contribute to the verdict obtained.” *Id.* at 24. The constitutional inquiry therefore focuses on the effect of the error upon the jury’s verdict, not whether sufficient evidence otherwise exists to sustain the conviction. *See Ohio v. Roberts*, 181 Ohio St.3d 236, 2025-Ohio-5120, ¶ 136 (adopting the *Chapman* standard of review).

This Court has repeatedly cautioned against confusing constitutional harmless-error review with a sufficiency-of-the-evidence analysis. As Justice Scalia explained: “The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Thus, the reviewing court

² The Fifth District employed an incorrect standard of review, even under Ohio law. On May 14, 2025, almost six months before the *Vicario* decision, the Ohio Supreme adopted a uniform standard of review for both evidentiary and constitutional errors. This standard, consistent with *Chapman v. California*, provides: “When a defendant objects to a constitutional error at trial, the error is a reversible error unless the State establishes beyond a reasonable doubt that the error complained of did not contribute to the conviction.” *Ohio v. Roberts*, 118 Ohio St.3d 236 ¶ 136 (2025), citing *Chapman*, 386 U.S. 18, 24 (1967). *Vicario* filed a Motion for Reconsideration in the Fifth District requesting the court to re-evaluate the error under the proper standard. The Fifth District denied the request.

must determine whether the constitutional violation contributed to the verdict actually returned by the jury, not whether the remaining evidence could independently support a conviction.

The prejudice cannot be understated. The improper hearsay in the second interview bolstered V.M.’s credibility improperly. The jury heard Sammons testify about V.M.’s statements during the first forensic interview. It then heard V.M.’s testimony. And to punctuate the point, the jury heard Castro (yet again) repeat what V.M. said about Vicario. Specific to the elements of the offenses, V.M. denied vaginal penetration in the first interview, but not the second. Castro’s repetition of this, absent any meaningful cross-examination, certainly impacted the most important part of the case—V.M.’s credibility. Under the proper standard of review, this was not harmless.



CONCLUSION

Since its landmark decision in *Crawford v. Washington*, this Court has consistently refused to permit courts to circumvent the constitutional guarantee of confrontation. The Sixth Amendment “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford*, 541 U.S. 36, 61 (2004). This case presents a question left unanswered by *Crawford* and other confrontation jurisprudence: whether a declarant’s earlier appearance at trial satisfies the Sixth Amendment when the trial court’s delayed evidentiary ruling deprives the defendant of a meaningful opportunity to cross-examine the declarant

about the testimonial statements ultimately admitted against him.

For the reasons stated, the Court should grant the petition for certiorari.

Respectfully submitted,

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