STATE OF WISCONSIN

COURT OF APPEALS - DISTRICT II

Case No. 2021AP001590

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTONIO G. RAMIREZ, JR.

Defendant-Respondent.

On notice of appeal from an order entered in the
Kenosha County Circuit Court,
the Honorable David P. Wilk, presiding

RESPONDENT'S BRIEF

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INTRODUCTION

The state accused Antonio Ramirez of two violent sexual assaults of his young stepdaughter. The case went to trial. At that trial, the alleged victim didn't testify. Neither did her brother, who the state said was a witness to one of the assaults. Instead, the state introduced the children's alleged statements through other witnesses. These included statements to the police.

Shortly after Ramirez's trial, the Supreme Court decided *Crawford v. Washington*, remaking the law around the Confrontation Clause. Though the state has previously (and wrongly) argued that *Crawford* did not apply to Ramirez's case, it now concedes, having been corrected by the federal courts, that it does. Accordingly, the state now admits that some of the hearsay introduced against Ramirez violated his Fifth Amendment right to confront his accusers.

But the state still insists that Ramirez should not receive a new trial. It claims that no harm came to Ramirez because, in its telling, the testimonial hearsay it introduced merely replicated other, properly admissible testimony.

The state is wrong. Much of the testimony it calls admissible was *also*—as the trial court found—admitted in violation of Ramirez's right to confrontation. All the statements at issue were the product of a police-instigated criminal investigation;

most were made directly to or in the presence of investigating officers. Three courts have now rejected much of the state's case that these statements were not testimonial. Because the objective facts—as opposed to the state's speculative mind-reading—show that the statements *were* testimonial, this Court should reject it as well.

The circuit court also granted a new trial for a separate and independent reason. While preparing to try Ramirez, the prosecutor summoned a doctor who'd treated the alleged victim to his office and, per the doctor, "subtly" threatened him with criminal charges. The state later granted the doctor immunity in exchange for his testimony. At trial, the court refused to allow Ramirez to introduce evidence of this immunity grant. The state now concedes there was no lawful basis for this decision; it only claims that the stifling of Ramirez's counsel was harmless. The state's argument here also depends on speculation: speculation about how the doctor *might* have testified had he not been bullied. This is unknowable—because the state's efforts to keep Ramirez from inquiring succeeded—and beside the point. The threat and immunity mattered because they went to the doctor's credibility; his credibility mattered because he was the sole medical witness to the 1998 incident, and testified that he'd suspected abuse.

The circuit court correctly determined a new trial is necessary. This Court should affirm.

ISSUES PRESENTED

1. Over 21 years ago, a jury convicted Antonio Ramirez of two sexual assaults of his stepdaughter. Much of the state's evidence against Ramirez consisted of out-of-court statements by the alleged victim and her brother, neither of whom testified. The state has long conceded that the admission of some of these statements violated Ramirez's confrontation rights. Did the introduction of these out-of-court accusations prejudice Ramirez, such that a new trial is necessary?

The circuit court granted a new trial. Because the state cannot demonstrate beyond a reasonable doubt that the confrontation violations were harmless, this Court should affirm.

2. While preparing to try Ramirez, the prosecutor summoned a doctor who'd treated the alleged victim to his office and, per the doctor, "subtly" threatened him with criminal charges. The state then granted the doctor immunity in exchange for his testimony, and the circuit court barred Ramirez from exposing this fact to the jury. The state now concedes Ramirez was entitled to introduce the fact that the prosecution and the doctor had entered into this *quid pro quo*. Has the state proved beyond a reasonable doubt that this error didn't prejudice Ramirez?

The circuit court granted a new trial on this ground as well. This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are merited. The relevant law is well-established and the case can be resolved on the briefs.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The trial

On Labor Day 1999, Ramirez's wife, Cynthia, contacted police to report that she thought her husband had sexually assaulted her daughter. (551:126). When Police Officer George Larsen responded, Cynthia told him that she and Ramirez had had a holiday gathering that day and, when it was over, she drove a relative home. (551:127). Upon returning home, Cynthia said, she found the door locked; she broke into the house and saw Ramirez walking out of M.G.'s bedroom, pulling up his shorts. (551:127). Cynthia said that she found M.G. in a bathroom, on the toilet, looking upset, and that Cynthia's son, A.R., told her that Ramirez had been with M.G. on her bed. (551:127-28). Officer Larsen further testified that Cynthia reported that she accused Ramirez of molesting M.G., which led to a physical fight between the two of them. (551:128). Cynthia also said Ramirez had choked their son. (551:132). Cynthia took the children to her mother's house and called the police. (551:126-27).

Upon receiving this report, Officer Larsen initiated a sexual-assault investigation and arranged for Ramirez to be immediately arrested on the domestic-violence complaint. (551:138). Larsen then drove Cynthia and M.G. to the hospital, in his squad car, for further questioning and a sexual-assault examination. *Id.*; *see also* 463:60 (Cynthia testifying that she was told they "had to go" to the hospital for the examination). Once at the hospital, Officer Larsen had Cynthia and M.G. meet with Nurse Donna Karpowicz-Halpin, along with himself, so that M.G. could "be examined for a sexual assault." (462:97; 551:129). Immediately after the examination, the nurse would report to law enforcement everything that had occurred in the examination room (while Officer Larsen was in the room and not), including what M.G. had told her. She would also turn over physical evidence and, later, testify at trial about these matters. (462:98; 491).

Nurse Karpowicz-Halpin testified that she began her examination of M.G. by conducting normal medical checks (she listened to M.G.'s lungs, etc.) and asking about school— "you know, just to build a rapport." (462:100-101). Then the nurse asked M.G. what had happened. *Id.* She asked questions like: "where this happened." (462:102). She testified that M.G. responded that she'd been laying on her bed, in her bedroom, when Ramirez had put his "pee-pee by her butt . . . on top of her." *Id.* Afterward, she went to the bathroom and wiped herself with toilet paper and threw it in the wastebasket. (462:103). Officer Larsen was involved with this questioning. (551:130). He

offered M.G. a stuffed bear to get her to clarify precisely where on her body Ramirez had touched her. *Id.* Then he stepped outside the examination room to tell an "evidence tech" that they should collect evidence from the bathroom. *Id.*

At some point, an ER doctor joined the examination, with the nurse and Cynthia remaining. (551:21-22). It is not entirely clear whether Officer Larsen was involved with questioning once the doctor arrived; he testified that he left the room when M.G. had to get undressed, but it's not clear when that happened, or whether and when he returned. (551:132-33). The ER doctor, Suzanne Siegel, testified that she asked M.G. "very specific questions" about what happened. (551:23). In response, M.G. told her the same story she'd told the nurse. *Id.* Dr. Siegel examined M.G., noting that there was redness and discharge around her vagina, but no injury and no semen. (551:24,30-31; *see also* 462:108-110). There was suspected semen on her thighs. (551:32). According to "a rape protocol," the examiners collected evidence: M.G.'s clothing and swabs from her body. (551:108-09). This went into a "rape kit" that was sent to the crime lab. (551:33).

While Dr. Siegel was in the room, Nurse Karpowicz-Halpin elicited statements about another, earlier sexual assault, alleged to have occurred in 1998. Nurse Karpowicz-Halpin asked M.G. if the Labor Day 1999 incident was the only time something like this had happened. (462:103). The nurse testified that M.G. responded negatively, after

which Cynthia prompted M.G. to talk about a vaginal injury that M.G. had been treated for in 1998. Cynthia asked if that injury had resulted from Ramirez assaulting her, rather than falling in the bathtub, as everyone had believed. (462:104). M.G. said yes: Ramirez had caused the injury, by trying to put his penis inside her. *Id.* The nurse asked M.G. why she hadn't told anyone before, and M.G. responded that Ramirez had threatened that if she did, he would harm her mom, brother, or grandmother. (462:104-05).

Again, the record is not clear whether Officer Larsen was in the examination room when M.G. made statements about an earlier assault. However, it at least appears that he was out of the room at the time because Officer Larsen testified at trial that Cynthia later told him what M.G. said in the examination room about the 1998 incident. (551:130-31). Another officer, Detective John Gregory, questioned Cynthia at the hospital and he testified that she also told him about M.G.'s examination-room accusation. (551:162-63).

The next day, Detective Gregory conducted additional questioning of Cynthia, M.G., and M.G.'s brother. (551:167). This questioning happened at the police station. (551:164). Detective Gregory testified that M.G. made statements similar to those she'd made to Officer Larsen and the examiners the previous day about both alleged incidents. (551:173-75,188). As for the brother, Detective Gregory said he told him about the fight that had occurred the previous day (Ramirez would be acquitted of all counts related

to that fight) and also said that Ramirez had gone into the bedroom with M.G. with his shorts off. (551:175-78). The brother said that, later, he saw "white boogers" on M.G.'s bed. (551:178-79).

Other than the out-of-court statements described above, the state did not have additional evidence directly supporting M.G.'s version of events. It presented other evidence at trial, including DNA evidence related to the 1999 incident. A forensic scientist with the state's crime lab testified that swabs that the sexual-assault examiners took from M.G.'s thighs and from her underwear revealed semen that DNA testing showed matched Ramirez. (463:107). The crime lab also tested toilet paper found in the wastebasket, which revealed Ramirez's DNA. *Id.* They tested a swab from M.G.'s external vaginal area that revealed a small amount of DNA that likely, but with less certainty, came from Ramirez. (463:103,109-110).

At trial, Cynthia testified that she had lied to police, and coached her children to lie, in order to frame Ramirez for sexual assault. Cynthia told the jury that after their Labor Day party, she was angry that Ramirez had gotten very drunk in front of her family and she suspected him of infidelity. (463:64-68; 551:85-89). She wanted Ramirez to go to jail, so she made up the story of the assault. (463:68,76-78; 551:92-94). In truth, she testified, she had not seen Ramirez pulling up his shorts when she got back from dropping off her uncle; Ramirez was passed-out drunk, and the children were watching TV. (463:60-64). Indeed, Cynthia testified that Ramirez hadn't worn

shorts that day; she and other relatives testified that he'd worn pants. (463:63; 563:45,58). Ramirez's brother, who lived with Ramirez and his family at the time, testified that he was at a friend's house during the Labor Day party, but he returned home in the evening to find Ramirez passed-out drunk, the children watching TV, and Cynthia reheating food. (563:97,105-06). Cynthia "had an attitude or something." (563:106). Ramirez's brother then left and didn't come back until the next day. (563:106-07).

Cynthia claimed she had not planted DNA evidence. (551:93). However, defense counsel at trial elicited evidence that Ramirez and Cynthia had sex on the morning of Labor Day, with a condom, and threw the used condom in the garbage. (551:79,116). Defense counsel argued to the jury that Cynthia had confessed her scheme at trial, but hadn't been able to admit her worst transgression: planting DNA evidence. (552:63–66).

The immunity grant

As for the 1998 incident, there was no DNA evidence. Dr. Schellpfeffer testified that M.G. had presented at the hospital with a vaginal tear that required stitches. (551:142-44). M.G. and Cynthia told the doctor that M.G. had fallen in the bathtub and injured herself, and said she hadn't been abused. (551:145-46,172). The hospital did a pap smear and found no semen. (551:160). Dr. Schellpfeffer said the injuries were "consistent" with sexual abuse but could have other causes. (551:145,148-50). No one—

including Dr. Schellpfeffer—reported the injury as suspicious. However, he testified—after his grant of immunity from the state—that he was so concerned about the possibility that he had twice asked Cynthia whether M.G. could have been abused. (551:136,137,142). He further claimed he called M.G.'s pediatrician days later to alert him of possibility. (551:144).

At a pretrial hearing, Dr. Schellpfeffer had testified that, before the preliminary hearing, he had been summoned to meet with the prosecutor. (17:4). He said he had felt "subtly intimidated" during the meeting; he said the prosecutor did not "overtly" accuse him of a criminal act, but gave his "opinion that I might be culpable" of failing to report a sexual assault. (17:9). This is a crime under Wis. Stat. § 48.981(6), and the doctor agreed that the prosecutor had "subtly implied [he] could be prosecuted." (17:9). Dr. Schellpfeffer was concerned enough to contact his personal attorney, who represented him at this pretrial hearing. (17:2,9).

At a subsequent hearing, the state noted that it had conferred immunity on Dr. Schellpfeffer for his testimony. (460:25). The state claimed that the law prohibited Ramirez's counsel from "mak[ing] any reference to the fact that Dr. Schellpfeffer [had] been afforded immunity from prosecution." *Id.* Ramirez objected, arguing that the threat of prosecution and grant of immunity could have put pressure on the doctor to alter his testimony to suit the state. (460:26-28). The prosecutor claimed that *State v. Heft*, 185

Wis. 2d 288, 517 N.W. 2d 494 (1994), required that the immunity grant be kept from the jury, and the court ultimately agreed and ordered the defense to refrain from asking about it. (460:28,29,35,37).

Ramirez was found guilty of the counts related to the alleged sexual assaults. He was acquitted of all the other counts related to the alleged altercation with Cynthia and the children and resisting the police. (552:114-15).

The appeals and subsequent proceedings

Ramirez sought an appeal. His first counsel filed a no-merit report, which this Court ultimately rejected. *See State v. Antonio G. Ramirez, Jr.*, No. 2003AP2038 (Order of Dec. 7, 2004).

During the pendency of the no-merit proceeding, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which dramatically altered the law regarding the Confrontation Clause. Ramirez was appointed new counsel, who litigated a number of unsuccessful claims. But despite urging from Ramirez—which is documented in the record—counsel did not raise any confrontation claims based on *Crawford*. (571:18,21). This Court affirmed his convictions. *See State v. Antonio G. Ramirez*, No. 2005AP2768, unpublished slip op. (Apr. 25, 2007).

Ramirez, now *pro se*, filed a Wis. Stat. § 974.06 motion for postconviction relief, alleging his postconviction and appellate counsel had been ineffective for failing to raise a confrontation claim.

The circuit court denied the motion, holding that *Crawford* did not apply to his trial. On appeal, the state took this position as well, saying that *Whorton v. Bockting*, 549 U.S. 406 (2007), which declined to apply *Crawford* in collateral attacks on convictions that were final before *Crawford* was issued, barred relief. *State v. Antonio G. Ramirez, Jr.*, No. 2013AP563 (Respondent's Brief at 17). This Court agreed and affirmed the circuit court. *State v. Antonio G. Ramirez, Jr.*, No. 2013AP563, unpublished slip op. (Mar. 26, 2014).

Ramirez then petitioned the federal courts for relief. The district court first held this Court's reliance on *Whorton* to be an unreasonable application of clearly established federal law, because Ramirez's case was on direct appeal, not collateral review, when *Crawford* was decided. *Ramirez v. Tegels*, 2018 WL 6251349, at *6 (W.D. Wis. Nov. 29, 2018). It accordingly ordered briefing on the merits.

At the conclusion of this briefing, the district court held that postconviction counsel had been ineffective for failing to raise a confrontation claim. The state had argued, among other things, that a confrontation claim would not succeed on the merits because various of the introduced statements were nontestimonial. As it does here, the state relied on *Ohio v. Clark*, 576 U.S. 237 (2015), arguing that the children's youth placed their hearsay outside the Confrontation Clause. The court rejected this argument, noting crucial differences between this case and *Clark*: Ramirez had been arrested, so there was

no ongoing emergency; many of the statements were elicited by police officers (rather than, as in *Clark*, a teacher); and some of the crucial questions to M.G. concerned an incident from the year before, suggesting an intent "to establish past events potentially relevant to a later prosecution." *Ramirez v. Tegels*, 413 F. Supp. 3d 808, 820-21 (W.D. Wis. 2019). The court also rejected the state's argument that the other evidence against Ramirez was "overwhelming," such that a confrontation violation could not matter. *Id.* at 822-23.

The state appealed, and a three-judge panel of the Seventh Circuit unanimously affirmed. *Ramirez v. Tegels*, 963 F.3d 604 (7th Cir. 2020). Like the lower court, it concluded that many of M.G.'s statements in the emergency room were "more likely… made for the primary purpose of 'prov[ing] past events potentially relevant to later criminal prosecution.'" *Id.* at 616 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). As to prejudice, like the lower court, the Seventh Circuit concluded that "[t]he evidence against Mr. Ramirez is not overwhelming if the contested statements are excluded." *Id.* at 618.

The Seventh Circuit ordered Ramirez be released or receive a new appeal; on the state's motion, his Wis. Stat. Rule 809.30 rights were reinstated. He filed a postconviction motion raising the confrontation claims. (5839-13). He also challenged the trial court's refusal to permit him to cross Dr. Schellpfeffer on the immunity grant as a violation of due process. (583:13-14). After additional briefing and argument by

Ramirez and the state, the circuit court granted a new trial on both counts.

Regarding the confrontation violations, the court said that

> M.G.'s statements to Larsen and Karpowicz-Halpin regarding M.G. going to the bathroom and wiping herself are clearly testimonial. M.G.'s statements that an assault occurred in 1998 are similarly testimonial, as were M.G.'s statements to Detective Gregory the next day, and those by M.G.'s brother. These were not spontaneous statements. They weren't for the purposes of addressing an ongoing emergency. They were for the purposes of securing evidence to use in the prosecution of the defendant.
>
> As the Court asked during argument, what reasonable purpose does Larsen have to be present during portions of the examination if not for the preservation of evidence for use at trial?
>
> Lastly, it is important to recall the recantation by Cynthia. She said she made it all up and coached the children on what to say. Therefore, the only version of events the jury can compare to the mother's recantation is M.G.'s out-of-court statements relayed to the jury by others and not subject to cross-examination.

(598:6-7).

The circuit court also held that Ramirez was entitled to ask Dr. Schellpfeffer about his immunity grant, and that preventing him from doing

so kept the jury from hearing admissible evidence going to credibility. (598:7).

The state appealed. (607).

ARGUMENT

I. Introduction of out-of-court statements by Ramirez's accusers violated his right to confrontation, and the violation was not harmless.

A. General Principles

The Supreme Court in *Crawford* did not set the outer limits of what is "testimonial," but it suggested that the inquiry focused on whether statements were made "in anticipation of or with an eye toward a criminal prosecution." *United States v. Tolliver*, 454 F.3d 660, 665 (7th Cir. 2006); *see also Crawford*, 541 U.S. at 51–52. In *Davis*, the Court held that statements made in response to a 911 operator's questions were nontestimonial—they were not reporting past events, but rather reporting events as they occurred for the purpose of getting assistance. *Id.* at 827; *see also*, *e.g.*, *Clark* (primary purpose of a three-year-old's statement to his preschool teacher about ongoing abuse was to get help).

On the other hand, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or

prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 823; *see also*, *e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 668 (2011) (blood alcohol content (BAC) report was testimonial because its "primary purpose" was evidentiary) (Sotomayor, J. concurring). This is an objective reasonable-person test, but the Court in *Clark* said that the age of the declarant could be relevant; the declarant there was a toddler, who would not have understood that his statement to a teacher could be used in a criminal case. 576 U.S. at 247-48.[1]

The state agrees that some of the challenged statements were introduced in violation of *Crawford*. It has also abandoned its previous claim that the confrontation claims are not preserved. App. 21. Its only argument is that *some* of the challenged statements were admissible on the merits, and that

[1] As the state notes, our supreme court has gleaned from *Ohio v. Clark* four factors relevant to deciding whether a particular statement's primary purpose is testimonial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant and (4) the context in which the statement was given." *State v. Mattox*, 2017 WI 9, ¶32, 373 Wis. 2d 122, 890 N.W.2d 256. *Mattox* didn't suggest this list was exhaustive, though these factors seem adequate to the analysis this case requires. Nevertheless, though this brief will show that the formality, law-enforcement involvement, declarant's ages and context of the statements demonstrate their testimonial nature, it will not employ the factor-by-factor structure of the state's brief.

the others, though they should not have come in, were harmless. Similarly to the state's brief, this brief treats the statements as consisting of distinct groups—though it breaks them down into four groups, rather than three:

1) M.G.'s statements to Officer Larsen and Nurse Karpowicz-Halpin, then repeated to Dr. Siegel and Nurse Karpowicz-Halpin, made during a sexual-assault examination that that Ramirez had assaulted her earlier that day;

2) M.G.'s statements on the same occasion to Nurse Karpowicz-Halpin and Dr. Siegel that Ramirez had also assaulted her in 1998;

3) M.G.'s statements to Detective Gregory, made the next day, repeating her earlier accusations; and

4) M.G.'s brother's statements to Detective Gregory, also made the next day, that he saw Ramirez in M.G.'s room and later saw "white boogers" on her bed.

B. M.G.'s statements at the police station were testimonial.

Rather than taking the statements chronologically, Ramirez begins with the statements on which the parties agree. The third set of statements—those M.G. made to Detective Gregory the day after her hospital exam—are testimonial. They were made as part of a law-enforcement

investigation, in response to questioning by a detective, and in that detective's office. (551:164-68). Though the state faintly protests that it harbors "doubts" about whether any 8-year-old can "sufficiently understand prosecution" so as to make testimonial statements, it makes no argument on the point. It instead professes to "accept" the assistant district attorney's concession in the circuit court. In fact, the state also conceded the same point before the Seventh Circuit. *Ramirez*, 963 F.3d at 615.

Moving beyond the state's concession, there's no reason to believe that a typical 8-year-old doesn't understand that police investigate crimes, or that telling police officers about crimes can lead to prosecution and punishment. What's more, M.G. wasn't the only participant in the interrogation: as the state notes, the reasonable views of *both* parties—interrogator and declarant—enter into the primary purpose inquiry. App. 25. It's beyond question that Detective Gregory reasonably viewed the primary purpose of interviewing an alleged victim, memorializing the conversation, and turning his report over to district attorney as aiding in prosecution. The state's concession is apt: M.G.'s statements to Detective Gregory were testimonial, and their introduction violated Ramirez's confrontation right.

C. M.G.'s brother's statements to Detective Gregory were testimonial.

All the circumstances of M.G.'s brother's interview with Detective Gregory were identical to those of M.G.'s interview: there was no ongoing emergency, the setting was a formal police interview at the station house, and the purpose was plainly testimonial from the detective's perspective.

Forgetting its earlier observation that the perspective of the interrogator matters, the state simply declares that "the age of the declarant" here is "dispositive." App. 36 (italics and bolding omitted). But its argument on this point is no argument at all: it once again simply asserts "doubt" about a five-year-old's ability *ever* to make a testimonial statement. It points to no cases in support of its proposed categorical rule, and attempts no further persuasion. Though the state refers to *Clark*, that case differs starkly from this one: a three-year-old child vs. a five-year-old; a statement to a teacher vs. a statement to a detective; a schoolhouse vs. a police station; and an ongoing emergency vs. a criminal investigation aimed a prosecution.

An adult need not have a *juris doctor* to make a testimonial statement. *Crawford* and its progeny ask what a reasonable person—not a reasonable prosecutor, defense attorney, or judge—would know. A reasonable adult knows that telling police about criminal activity can lead to conviction and punishment; this is what makes their statements

testimonial. The same knowledge can reasonably be imputed to a typical five-year-old: that the police aid in prosecuting crimes, and that telling a police officer about a crime may result in a person going to jail.

A (non-emergency) interview by a police officer at the police department about past criminal acts is the Platonic ideal of a testimonial situation. *Clark*, 576 U.S. at 243 (2015) ("statements by a witness during police questioning at the station house" are testimonial); *Crawford*, 541 U.S. at 68 (the term "testimonial" "applies at a minimum … to police interrogations.") This is true for adults and children alike. *See* Daniel D. Blinka, Wisconsin Evidence § 802.302 (4th ed.) (even for young children "if the question is asked by a police officer, the answer is very likely testimonial").

D. M.G.'s statements at the hospital were testimonial.

When M.G. was at the hospital on Labor Day 1999, she made statements both about what she said had occurred earlier that day and about an incident that happened in November of 1998. The two sets of statements carry some analytical differences, but this brief will begin by discussing what they have in common.

First, they came about as the result of a police investigation. They were made either to investigating officers or to medical staff at the hospital where police said M.G. "had to go" to "be examined for a sexual assault"—and where even the statements she

made to the nurse were immediately memorialized and turned over to the police. (463:60; 462:97; 551:129; 462:98; 491). Officer Larsen was not aware of any physical injuries to M.G.; his motivation, which brought about M.G.'s presence in the hospital room, was plainly the criminal investigation.

Many cases recognize that statements made under these sorts of circumstances are testimonial. See, e.g., *See, e.g.*, *Bobadilla v. Carlson*, 575 F.3d 785, 793 (8th Cir. 2009) (child victim's statements to a social worker were testimonial because the interrogation was "initiated by a police officer to obtain statements for use during a criminal investigation"); *State v. Arnold*, 933 N.E.2d 775, 784 (Ohio 2010) (some statements by four-year-old rape victim to social worker in "child advocacy center" were testimonial); *Hartsfield v. Com.*, 277 S.W.3d 239, 245 (Ky. 2009) (statements to nurse were testimonial where nurse's questioning involved past events, was not related to an ongoing emergency, and took on the nature of a formal interview); *State v. Hooper*, 176 P.3d 911, 917 (Idaho 2007) (videotaped statements by six-year-old victim to nurse and forensic examiner were testimonial, as interview was geared toward gathering evidence).

Second, all the statements concerned incidents in the past, rather than an ongoing threat: Ramirez had already been arrested. As the federal district court put it, "[t]he statements were not spontaneous and were not made in the context of an ongoing emergency." *Ramirez*, 413 F. Supp. 3d at 820; *see also*

Davis, 547 U.S. at 827 (distinguishing between statements reporting an ongoing emergency and those establishing "some past fact").

Finally, all were made by a child substantially older than the three-year-old in *Clark*: a child who could reasonably be expected to know that statements to the police (and others to whom the police have directed them) can be used to secure criminal punishment. It shouldn't be overlooked that the state has *conceded* that M.G.'s age didn't mean she couldn't make testimonial statements. As the Seventh Circuit noted, the state acknowledged there, as it does here, that she made testimonial statements the following day to Detective Gregory. "This concession suggests that M.G., despite her young age, was capable of understanding that her other statements could have been made for the primary purpose of prosecution as well." *Ramirez*, 963 F.3d at 615.

Considering first the statements about the 1998 incident, they were both the most crucial and the most clearly testimonial. They were crucial because these statements were the only evidence tying Ramirez to the alleged 1998 assaults; they were plainly testimonial because they had little or no connection to medical care. The state claims that *all* the hospital statements had a primary purpose of obtaining or providing medical treatment. But it can't explain how this is true for questions and answers about things that had happened nearly a year earlier. Tellingly, it simply asserts, as fact, that the nurse's inquiry about

earlier events was an attempt "to ascertain the extent of M.G.'s physical injuries and psychological trauma." It then cites a page of trial transcript which contains no trace of any such testimony by the nurse. App. 33, citing (462:104).[2] Absent the state's mind-reading, there are no facts to sustain its contention that questions about a long-ago incident—as part of a police-instigated "examinat[ion] for sexual assault"—were not primarily geared to establishing "past events." *See Davis*, 547 U.S. at 827; *Hartsfield*, 277 S.W.3d at 245.

Regarding M.G.'s statements about things that had happened earlier that day, some may, as the state says, have had the primary purpose of facilitating medical treatment, at least from the nurse's perspective: for example, the answers to questions about whether she was hurt and what had caused any injury. See *Ramirez*, 413 F. Supp. 3d at 820-21. On the other hand, some of the nurse's questions were not clearly for this purpose: for example, where the assault happened, or whether anything like it had happened before. *See id.* at 821; (462:102-03). And it's important to note the physical product of M.G.'s time in the hospital: a "rape kit," assembled by the medical professionals, to be sent to the state crime lab for testing. (551:33). There can be no argument that the collectors of this evidence weren't substantially engaged in the investigation of crime at the state's behest.

[2] This is not the state's only foray into the thoughts of others, as will be seen below.

What's more, the nurse was not the only participant in the conversation: Officer Larsen was in the room, and he engaged in at least some of the questioning, though the trial record is not clear about how much. (The state cites a handful of transcript pages in support of its claim that "nearly all" M.G.'s statements were in response to the questions of others. App. 29. Certainly, these pages establish that other people asked questions; they do not say anything about what questions Larsen asked.) At a minimum, Larsen offered M.G. a stuffed bear to get her to clarify precisely where on her body Ramirez had touched her. (551:130). Larsen was not a medical provider, and there can be no argument that a reasonable person wouldn't view him as being engaged in securing evidence against Ramirez.

Turning to M.G.'s perspective, the state posits that she had "[no] purpose at all," App. 31, but even that unsatisfying claim is built on a couple of critical, and unsupported, assumptions. First, of course, it relies on her age, which Ramirez has discussed above. It also suggests that "having just been assaulted," M.G was facing an "emergency." *Id.* Here again, the state is engaged in telepathy. It goes further: it asserts that M.G.'s "shutting down" means she was not primarily "concerned with a future legal proceeding against her abuser." *Id.* Remarkably, the state is able to discern that she "was just coping at the time." *Id.* Still more remarkably, the state can confidently declare, without citation, that M.G. had no "righteous anger toward her abuser." App. 34.

The state's argument, in other words, departs extravagantly from assessment of the objective facts. These facts include, again, the fact that this was an interview initiated by, and in part conducted by, a police officer. They include the fact that Ramirez was already in jail, so there was no need to determine whether M.G. could safely be returned to his care. They include the fact that the interview partly concerned an incident from the previous year. And they include the fact that as part of the interview, M.G.'s interlocutors were collecting physical evidence for the purpose of turning it over to the state.

The state's argument about M.G.'s state of mind also crucially depends on the premise that Ramirez was guilty—that he'd just assaulted M.G., causing the trauma it says prevented her from making testimonial statements. The state's argument is thus circular, and depends on a presumption of guilt. What's more, it ignores the contrary evidence that the federal courts pointed out. Cynthia testified that she wanted Ramirez arrested because she was angry with him, and "that she had coached M.G. to falsely accuse Mr. Ramirez of sexual assault. A reviewing court could therefore conclude that Mrs. Ramirez caused her children to make their statements for the primary purpose of prosecution." *Ramirez*, 963 F.3d at 615. There could be no statements more testimonial than accusations expressly designed to bring about criminal charges.

E. Admission of the assault accusations in violation of Ramirez's right to confront his accusers was not harmless.

The state's harmless error argument stands or falls with its claim that most of the disputed statements were not testimonial. That is, it argues that *if* M.G.'s statements in the hospital *and* her brother's statements to Detective Gregory were properly admitted, *then* the admission of M.G.'s testimonial statements to Detective Gregory was harmless. App. 37-39. The state also suggests that the confrontation violations would be harmless as to the convictions for the 1999 incident even if M.G.'s hospital statements about that incident are testimonial. App. 39.

But as Ramirez has shown, many of M.G.'s statements in the hospital *were* testimonial—including all of the most critical (from the state's perspective) statement—and so were her brother's statements to Detective Gregory. This alone defeats the state's general harmlessness argument. As the Seventh Circuit noted, "[T]he evidence against Mr. Ramirez is not overwhelming if the contested statements are excluded, particularly with respect to the November 1998 assault." *Ramirez*, 963 F.3d at 618. This is because, as the court also observed, M.G.'s out-of-court statements were the *only* evidence tying Ramirez to the alleged assault. *Id.*

Even the state's limited claim about harmlessness vis-à-vis the 1999 incident fails. Though, as the state says, there was physical evidence, including semen and other DNA, there was also a defense theory of Ramirez's innocence that was adequate to explain this evidence: that Cynthia had fabricated the allegations and coached her children (as she said she had), and had also planted the evidence. As the federal appellate court observed:

> Mrs. Ramirez testified at trial that she fabricated the entire sexual assault accusation and coached M.G. to lie because she was angry at Mr. Ramirez. Although Mrs. Ramirez denied planting the DNA evidence, defense counsel argued that she did. Mrs. Ramirez had sex with Mr. Ramirez on the morning of the September 1999 assault, and she therefore had access to Mr. Ramirez's semen in a recently used condom. Investigators found DNA evidence in M.G.'s underwear, on toilet paper in the wastebasket, and on the outside of M.G.'s body, but they did not locate any inside of her body. Moreover, Dr. Siegel testified that M.G.'s vaginal redness was consistent with rubbing of that area. If the jury had not heard testimony concerning the contested out-of-court statements, it might have credited defense counsel's argument that Mrs. Ramirez planted the semen as part of her framing of Mr. Ramirez. Indeed, the jury demonstrated that it doubted Mrs. Ramirez's truthfulness by acquitting Mr. Ramirez on the charges of battery and false imprisonment, which were based on Mrs. Ramirez's allegations.

Id. at 619.

The state, as beneficiary of the confrontation violations, is obligated to show that they did not make a difference at Ramirez's trial to the exclusion of any reasonable doubt. Three courts have harbored such doubt; this Court should likewise decline to hold the violations harmless.

II. The exclusion of evidence about the state's immunity grant to one of its witnesses—which the state admits was error—was not harmless.

The state now concedes that the circuit court had no legitimate basis to prevent Ramirez from questioning Dr. Schellpfeffer about the state's grant of immunity. As Ramirez argued below, this decision violated his right to due process. *State v. Nerison*, 136 Wis. 2d 37, 46, 54, 401 N.W.2d 1 (1987). But the state says it can demonstrate beyond a reasonable doubt that this ban on impeachment of the sole medical eyewitness to M.G.'s 1998 injuries was harmless.

The state is asserting harmless error for the first time on appeal. In the trial court, it advanced the now-abandoned argument that the court's barring of cross was proper. This Court should refuse to address the state's new assertion of harmlessness. *See State v. Brown*, 96 Wis. 2d 258, 263, 291 N.W.2d 538 (1980).

But even if it chooses to address the argument, this Court should decline to find the error harmless. The state first argues that because Dr. Schellpfeffer testified in a way generally consistent with the

testimony of two other medical witnesses, he must not have been biased by the immunity grant. Then—despite the fact that it is not, to Ramirez's knowledge, a medical expert—the state declares on its own authority, that the "particular … facts" of M.G.'s injuries *compelled* Dr. Schellpfeffer to give the medical opinions that he did. App. 42-44.

Neither of the state's arguments holds water. While the state understandably wishes to portray Dr. Schellpfeffer's testimony as free of bias, we can't know whether it was: the circuit court largely prevented Ramirez from inquiring about bias. It did so completely at trial, but even at the pretrial hearing, the court intervened again and again—often at the state's behest—to prevent Ramirez from delving into how the threat might have affected Dr. Schellpfeffer. (17:5,6,7,9,10,11,12,14). And it makes no sense to say that Dr. Schellpfeffer can't have been biased because his testimony aligned with the state's expert witness—Dr. Guinn—and the other doctor the state called. That is, Dr. Schellpfeffer's testimony was about as favorable to the state as it could have been; this is not evidence of a lack of bias in the state's favor.

Nor, despite the state's rhetoric, is it competent to proclaim "the range of potential reasonable professional opinions" about M.G.'s injuries. App. 44. Once again, the state invites the Court to conclude that Dr. Schellpfeffer could not have testified any differently than he actually did, and once again, we cannot know because the state and trial court

prevented Ramirez from lines of inquiry it now admits were legitimate.

At any rate, the state's argument misses the point. The question is not how Dr. Schellpfeffer might have testified had the prosecutor not threatened him and then removed the threat in exchange for his testimony; there was nothing Ramirez or the court could do to change the fact that the prosecutor had done these things. Rather, the question is whether the court's error of depriving the jury of this information meant the jury could not adequately assess Dr. Schellpfeffer's credibility, or his claims that he'd suspected sexual abuse that he did not report.

Ramirez was thus hamstrung at trial in two ways. He was unable to confront his two accusers: the only ones who claimed to have witnessed the purported abuse. And as to an important witness he could confront—the only one who could speak to M.G.'s 1998 injuries—Ramirez was forbidden to inquire about the threats the state had made, and the benefits it had conferred, for his testimony. These are independent errors, but their effects reinforced one another. Ramirez could not ask M.G. what happened in 1998; he also could not paint a complete picture of the possible bias of a crucial state's witness. His was not a full or a fair trial.

CONCLUSION

Because the circuit court correctly concluded that Ramirez's trial violated his rights to confrontation and due process, and that these violations were not harmless, Ramirez respectfully requests that this Court affirm that court's order granting a new trial.

Dated this 4th day of May, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,255 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of May, 2022.

Signed:

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