STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001590

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTONIO G. RAMIREZ, JR.,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Antonio Ramirez

TABLE OF CONTENTS

Page

INTRODUCTION 3

ISSUES PRESENTED 5

CRITERIA FOR REVIEW 6

STATEMENT OF FACTS 6

ARGUMENT 18

I. This Court should grant review and hold that M.G.'s statements—made during an examination arranged by police, with an officer present and participating for portions—were testimonial. 18

A. A brief note about harmless error..... 18

B. Joint medical/criminal investigatory statements present thorny confrontation questions. 19

C. This Court is the proper body to develop the law and resolve the questions presented by this case..... 22

D. The Court should hold M.G.'s statements at the hospital were testimonial..... 23

II. This Court should grant review and hold that the trial court erred in preventing Ramirez from showing the jury that the state had conferred immunity on Dr. Schellpfeffer in exchange for testimony; it should further hold the error was not harmless. 27

CONCLUSION..... 30

INTRODUCTION

Almost 25 years ago, the state put Antonio Ramirez on trial, alleging two violent sexual assaults of his young stepdaughter, M.G. But M.G. didn't testify. Nor did her brother, who the state said had witnessed an assault. Instead, the state introduced the children's claimed statements—including statements to the police—through other witnesses.

Ramirez was convicted. During his direct appeal, the Supreme Court remade the law of confrontation in *Crawford v. Washington*. Ramirez's then-appellate counsel didn't raise *Crawford*; so in 2020 the Seventh Circuit affirmed a habeas corpus grant and ordered new postconviction proceedings.

Ramirez moved the circuit court for a new trial. That court granted the motion on the ground that the first trial violated the Confrontation Clause, and also because Ramirez had been wrongly prevented from informing the jury that one state's witness had received immunity in exchange for his testimony.

The state appealed. The Wisconsin court of appeals declared that the Seventh Circuit "went astray" in its analysis, and reversed the trial court. The focus of the court of appeals' analysis was incriminating statements Mr. Ramirez's stepdaughter made at the hospital in the presence of her mother, a nurse, and a police officer.

Courts nationwide have struggled to apply *Crawford* and its progeny to statements made in this sort of dual-purpose setting: a medical evaluation conducted at the behest of, and sometimes with the participation of, police officers investigating a crime. Are such statements "testimonial," such that they implicate the Confrontation Clause? In both federal and state courts, the analyses and results are all over the board.

Here, though, the court of appeals did not engage with the tricky issues inherent in a joint medical/forensic interview. It simply employed a rubric this Court developed in a case about a toxicologist's report: *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256.

The four *Mattox* factors proved a poor analytical tool here. For example, the court of appeals spent a substantial portion of its scant discussion observing that the hospital conversation—which was, of course, conducted orally—was not "notarized." (Neither, of course, are most police interrogations, though they undoubtedly produce testimonial statements.)

The panel also recommended its opinion for publication. So unless this Court acts, Wisconsin's binding law on the vexed question of hospital/police interviews will be a brief gloss on an ill-fitting test. This Court should step in to give the question the analysis it deserves. It should also decide how to assess prejudice when a defendant is wrongly kept from exploring a witness's immunity grant.

ISSUES PRESENTED

1. After M.G.'s mother contacted police and accused Antonio Ramirez of assaulting M.G., an officer told the mother they "had to go" to the hospital for an examination, and drove them there in his squad. Were M.G.'s accusations in the hospital—made in the presence of, and with some participation by, the police officer, along with her mother and a nurse—testimonial?

The circuit court held they were testimonial, and granted a new trial. The court of appeals held most were not, and reversed. This court should hold the accusations were testimonial.

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 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. The court of appeals held any error harmless. This Court should reverse the court of appeals and order a new trial.

CRITERIA FOR REVIEW

As courts around the country have recognized, the testimonial nature of statements made to police *and* health care providers, or health care providers who assist in criminal investigation, presents a real, significant and knotty question of federal constitutional law. *See* Wis. Stat. Rule 809.62(1r)(a).

The decision below, though 52 pages long, contains only a few paragraphs of discussion of the issue. *State v. Antonio Ramirez*, 2021AP1590, ¶¶75-83 (Ct. App Nov. 15, 2023); App. 38-45. As noted above, this discussion relies chiefly on *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256, which presented very different facts. The court of appeals' other recent foray into this area, *State v. Nelson*, 2021 WI App 2, 395 Wis. 2d 585, 954 N.W.2d 11, generated three different opinions (a plurality, a concurrence, and a dissent) from the three judges on the panel. Thus, this Court's decision will help to clarify this important and fairly novel area of law. *See* Wis. Stat. Rule 809.62(1r)(c).

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 to the 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 the court of appeals 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). The court of appeals 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). The court of appeals 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 the court of appeals' 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. 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); App. 66-91. 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)); App. 82. 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; App. 90.

The Seventh Circuit ordered that 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; App. 60-61).

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; App. 61).

The state appealed. (607). The court of appeals reversed. *State v. Antonio Ramirez*, 2021AP1590 (Ct. App Nov. 15, 2023); App. 3-54. It held that

M.G.'s statements in the hospital were mostly nontestimonial. *Id.*, ¶¶75-83; App. 40-45. It further held that this rendered the introduction of both her and her brother's other statements to the police harmless, even if those statements *were* testimonial. *Id.*, ¶¶84-92; App. 45-51. It also called the trial court's decision to keep the Schellpfeffer immunity grant from the jury harmless. *Id.*, ¶¶94-99; App. 51-53.

ARGUMENT

I. This Court should grant review and hold that M.G.'s statements—made during an examination arranged by police, with an officer present and participating for portions—were testimonial.

A. A brief note about harmless error

Though the state's briefing below and the court of appeals opinion discuss harmlessness extensively, this Court should be aware that harmless error does not enter the picture unless it concludes that the statements M.G. made in the hospital were nontestimonial. That is, harmless error only becomes relevant *after* the court resolves the substantive constitutional issue presented, and then only if it resolves the issue against Ramirez.

This is because the state's claims of harmlessness apply not to the hospital statements, but to the statements M.G. and her brother made to Detective Gregory in formal interviews the next day.

The state argued (and the court of appeals agreed) that these statements largely duplicated the hospital statements. Thus if the hospital statements were nontestimonial, the argument goes, the latter statements' admission was harmless. If, as Ramirez asserts, the hospital statements instead *were* testimonial, this harmlessness argument loses all force.

B. Joint medical/criminal investigatory statements present thorny confrontation questions.

The Supreme Court in *Crawford* did not set the outer limits of what is "testimonial," but it suggested 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).

As was noted earlier, the court of appeals has once previously addressed the testimonial character of statements made in a medical/law enforcement setting, in *State v. Nelson*, 2021 WI App 2, 395 Wis. 2d 585, 954 N.W.2d 11. The three judges on the *Nelson* panel wrote three opinions; the concurrence noted that "[r]eview of similar cases around the country shows a divergence of results." *Id.*, ¶63.

The *Nelson* concurrence was correct about this. Shortly after *Crawford*, the Supreme Court of Ohio considered the statements a woman made to a nurse practitioner—part of a unit specializing in sexual assault and domestic disturbances—accusing the defendant of rape. *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006). Though many courts have said that *Crawford* mandates a "primary purpose" test to determine whether a statement is testimonial, the Ohio court rejected this test in favor of what it called an "objective witness" test on the way to finding the statements nontestimonial. *Id.* at 196, 199.

Two years later, the Supreme Court of Tennessee applied the "primary purpose" test to a similar set of facts; it concluded the alleged victim's statements to a SANE nurse *were* testimonial (while cautioning that this was not a blanket rule). *State v.*

Cannon, 254 S.W.3d 287, 304-05 (Tenn. 2008). In both cases, the trouble is the same: statements made to a medical professional who is acting in concert with, or at the behest of, law enforcement are made for multiple purposes. Which one is "primary" is difficult to ascertain, especially in cases like this one where both medical and law enforcement agents are present and participating.

The Ohio and Tennessee cases are merely examples; there are many more. *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). *See also State v. Miller*, 264 P.3d 461, 479-82 (Kan. 2011) (collecting cases).

Closer to home, in *United States v. Norwood*, 982 F.3d 1032 (7th Cir. 2020), the Seventh Circuit considered statements an alleged victim of

sex trafficking made to a nurse during a medical examination. It noted that "[s]tatements made to a SANE in the context of a part-medical, part-forensic examination are difficult to examine under the primary purpose test." *Id.* at 1046. It gave a detailed discussion of such analyses, noting among other things that questioning by, or the presence of, a police officer should weigh heavily. *Id.* at 1049.

In short, whether statements in a joint medical/investigatory setting are testimonial is a tough legal question demanding close, thoughtful scrutiny. And because it's a relatively novel issue in this state, it demands law development.

C. This Court is the proper body to develop the law and resolve the questions presented by this case.

As already noted, the court of appeals issued a 52-page decision, recommended for publication. But the bulk of this decision consists of exhaustive recitation of the factual background. *Ramirez*, 2021AP1590, ¶¶2-71. For legal analysis, the lower court relied chiefly on *Mattox*, 373 Wis. 2d 122, a case about a written report raising none of the complicated issues inherent in joint medical/forensic investigations. Though Ramirez cited cases from other jurisdictions, the court of appeals did not mention them or consider the reasoning that they employed.

What reasoning the court did employ was not convincing. In addition to its curious observation, noted above, that M.G.'s oral statements were not

"notarized," the court waved away the fact that the examination was initiated by a police officer and that the officer was present and participated. *Id.*, ¶76. Responding to Ramirez's point that the nurse immediately made a written report of the examination to the police, the court noted that she was legally obligated to do so as a mandatory reporter. *Id.*, ¶79 n.10. The opinion doesn't explain how this fact would make this police-initiated conversation *less* likely to be part of a criminal investigation.

This case presents an important question about the Confrontation Clause. This Court should accept review in order to provide an answer that can guide future litigants and courts.

D. The Court should hold 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.

All of these statements 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.

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").

And 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; App. 84.

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 connection to medical care. In the court of appeals, the state claimed that *all* the hospital statements had a primary purpose of obtaining or providing medical treatment. But it couldn't explain how this was true for questions and answers about things that had happened nearly a year earlier. Tellingly, it simply asserted, 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 cited a page of trial transcript which contains no trace of any such testimony by the nurse. App. Br. at 33, citing (462:104). 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 argued, 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.

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. Br. 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.

Given that the conversation at the hospital was police-initiated and heavily focused on establishing past events, this Court should conclude that the statements M.G. made were testimonial.

II. This Court should grant review and hold that the trial court erred in preventing Ramirez from showing the jury that the state had conferred immunity on Dr. Schellpfeffer in exchange for testimony; it should further hold the error was not harmless.

The state has conceded 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).

For the first time on appeal, though, the state argued the error was harmless. It first claimed 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 declared 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. Br. 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, was it competent to proclaim "the range of potential reasonable professional opinions" about M.G.'s injuries. App. Br. 44. The state's argument boiled down to an unsupported claim that Dr. Schellpfeffer could not have testified any differently than he actually did. But we cannot know this because the state and trial court prevented Ramirez from lines of inquiry the state later admitted were legitimate.

At any rate, the state's argument missed 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.

The court of appeals once again declared any error harmless. While it acknowledged that the state has the burden to show harmlessness beyond a reasonable doubt, the court faulted Ramirez for failing to identify the ways in which any bias in Dr. Schellpfeffer's testimony may have prejudiced him. *Ramirez*, 2021AP1590, ¶96; App. 52. But Ramirez couldn't explore bias, nor the resulting prejudice: the circuit court would not permit him to ask, even outside the jury's presence. The fact that Dr. Schellpfeffer's testimony was consistent with the state's theory, or that he may have *suspected* abuse in 1998, does not prove he was unbiased; it certainly does not show that the wrongful exclusion of evidence of bias was harmless. *Id.*, ¶¶97-99; App. 52-53.

CONCLUSION

For all of the reasons given, Antonio Ramirez respectfully requests that this Court grant review and that it reverse the decision of the court of appeals and reinstate the circuit court's grant of a new trial.

Dated this 15th day of December, 2023.

Respectfully submitted,

Electronically signed by
Andrew R. Hinkel
ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Antonio Ramirez

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 6,095 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 15th day of December, 2023.

Signed:
Electronically signed by
Andrew R. Hinkel
ANDREW R. HINKEL
Assistant State Public Defender