STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1590-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTONIO G. RAMIREZ, JR.,

Defendant-Respondent-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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The State of Wisconsin has received Defendant-Respondent-Petitioner Antonio G. Ramirez, Jr.'s petition for review from the court of appeals' published decision reversing a circuit court order granting Ramirez a new trial. The State opposes the petition. The ER nurse and doctor's examination of a child victim of sexual assault was not a "joint medical/criminal investigation," and this case is a poor vehicle to address confrontation issues arising from such circumstances. Review is also unwarranted because Ramirez's claims may be largely resolved on harmless error grounds, and the court of appeals correctly decided that the child's statements to ER medical providers in receiving treatment for a sexual assault were not testimonial. The petition should be denied.

BACKGROUND

In 2001, a jury found Antonio Ramirez guilty of first-degree sexual assault with great bodily injury and first-degree sexual assault of a child for assaulting his stepdaughter in 1998, and first-degree sexual assault of a child and child enticement for assaulting her again in 1999. (Pet-App. 4, 37; R. 430:1–4.)

On a night in September 1999, Cynthia R. came home to find the front door's chain lock engaged, which was unusual. (Pet-App. 4–5.) Cynthia forced the door open and found her eight-year-old daughter Megan[1] sitting on the toilet looking upset, and her husband Antonio Ramirez coming out of the child's bedroom pulling up his shorts. (Pet-App. 5.) Cynthia called police, and she told the responding officer that she suspected that her husband had sexually assaulted the child. (Pet-App. 5.) The officer drove Megan and her mother to the emergency room, where the child was seen by an ER

[1] Megan is the pseudonym the court of appeals used in its decision. (Pet-App. 4 n.1.)

nurse and doctor. (Pet-App. 4–5.) The officer stayed for some portion of the medical providers' examination.[2] (Pet-App. 5.) At one point, the officer asked Megan what happened, and he gave her a Teddy bear, which she used to show the officer where Ramirez touched her. (Pet-App. 5.) Neither the nurse nor doctor who examined Megan in the ER mentioned the officer's presence in the examination room in their testimony, much less described him as having any role in their examination of the child. (R. 462:96–105; 551:21–31.)

During the nurse's exam, Megan described that night's assault. She said that Ramirez had taken off her pants and his own pants, and she was lying on her belly on the bed. He then "put his pee-pee by her butt . . . like on top of her." (Pet-App. 7.) DNA testing of swabs collected from the child's private areas showed the presence of Ramirez's semen and sperm cells. (Pet-App. 31.)

The ER nurse asked Megan if this was the first time that this had happened to her. (Pet-App. 7.) She said no, it was not. (Pet-App. 7.) Cynthia then asked her daughter if, when she was seen at the hospital in 1998 for a vaginal tear, it was, as she reported then, because she had fallen onto the edge of the bathtub. (Pet-App. 7–8.) Megan responded, no, her "dad . . . was trying to put his pee-pee inside of her and that's how she got cut." (Pet-App. 8.) As Ramirez appears to concede, the record shows that the police officer was not present in the room when Megan made this disclosure. (Pet. 9–10.) The officer testified that he heard about it later from Cynthia. (R. 551:130–31.)

Megan did not testify at trial, and Cynthia recanted and testified that she made up the allegations against her husband, that Megan said nothing to ER personnel during the

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[2] As discussed in the argument, the State disputes Ramirez's assertion in his petition that the officer "was involved with" the ER nurse's "questioning" of Megan. (Pet. 8.)

examination, and that Cynthia coached Megan and her little brother to lie to the police. (Pet-App. 13–19, 25–27.) The ER nurses and doctors testified about the child's statements to them about the 1998 and 1999 assaults. (Pet-App. 6–9.) Law enforcement officers who interviewed Megan and her five-year-old brother, who also did not appear at trial, testified about the children's statements at trial. (Pet-App. 4–6, 12–13.) Law enforcement testimony showed that Megan's remarks to them closely tracked her statements to ER personnel. (Pet-App. 4–6, 12–19, 25–27.)

The DNA evidence showing that Ramirez's semen was found on Megan's private areas after the 1999 assault was presented at trial.[3] (Pet-App. 31.) Medical treatment records from the 1998 incident were also presented. (Pet-App. 9–10, 31–32, 34–35.) These records showed Megan arrived at the ER with a two to two and one-half centimeter cut to her lower vagina and perineum, which required stitches to repair. (Pet-App. 34.) The treating physician, Dr. Schellpfeffer, said the cut resembled "an episiotomy," a surgical cut used to enlarge the vaginal opening during childbirth. (Pet-App. 9 n.4, 34.) He testified that the injury was "certainly consistent possibly" with a penetrative injury, like a sexual assault. (Pet-App. 34–35.) He agreed that it was less consistent with the "straddle"-type injury onto the edge of the bathtub reported by the family. (Pet-App. 35.) Acknowledging that he labeled the cut as a straddle injury in the treatment records, Schellpfeffer said that he did so based on the family's report of a bathtub fall and their assurances that she had not been abused. (Pet-App. 34–35.)

At a pretrial hearing, Dr. Schellpfeffer testified that he felt intimidated by prior remarks made by the prosecutor

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[3] Though Cynthia insisted at trial that she made up the allegations and coached the children to lie, she denied planting Ramirez's semen on Megan's body. (Pet-App. 25–26.)

casting Dr. Schellpfeffer's decision not to report the 1998 incident as abuse as a breach of his duty to report suspected abuse. (R. 459:29–30; Pet-App. 33.) So, he sought and obtained immunity for his testimony in the case. (Pet-App. 33, 51.) The court prohibited Ramirez from cross-examining Schellpfeffer about the grant of immunity. (Pet-App. 33, 51.)

Two more doctors—the ER doctor who treated Megan for the 1999 assault and a third doctor—reviewed Dr. Schellpfeffer's records of the 1998 assault, and each testified (more unequivocally than Schellpfeffer did) that Megan's injuries were consistent with sexual abuse and not a straddle-type injury. (Pet-App. 9–11, 31–33.)

Following his trial and sentencing, Ramirez sought postconviction relief. In 2005, postconviction counsel filed a Wis. Stat. § 974.02 motion initiating direct review of Ramirez's conviction. (R. 561.) The circuit court denied the motion, the court of appeals affirmed, and this Court denied review. (R. 55; 59; 60.) In 2012, Ramirez, pro se, filed a Wis. Stat. § 974.06 motion alleging postconviction counsel was ineffective for not arguing that admission of Megan's and her brother's out-of-court statements violated Ramirez's right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36 (2004). (R. 571.) *Crawford* held that the admission of testimonial statements of a witness who is unavailable for cross-examination violates the confrontation right. 541 U.S. at 59–63. The circuit court denied Ramirez's motion without a hearing, the court of appeals affirmed, and this Court denied review. (R. 533; 486; 254.)

Ramirez field a petition for a writ of habeas corpus in the U.S. District Court. (Pet-App. 67.) In 2019, the federal court granted Ramirez's petition, concluding that postconviction counsel was ineffective for not raising the claim that admission of Megan's and her brother's out-of-court statements violated Ramirez's right to confrontation under *Crawford*, which was clearly stronger than the claims

counsel actually raised. (Pet-App. 67.) The Seventh Circuit affirmed in 2020 and ordered the reinstatement of Ramirez's right to direct appeal to allow him to pursue the unraised *Crawford* claim in the Wisconsin courts. (Pet-App. 67–68, 91.)

Following reinstatement of his right to appeal, Ramirez, by counsel, filed a motion for a new trial in the circuit court. Ramirez argued that he was denied his right to confrontation, and that the trial court erred in preventing him from impeaching Dr. Schellpfeffer with the immunity grant. (R. 583:1.) The circuit court, the Honorable David P. Wilk, granted Ramirez's motion, adopting both of Ramirez's new trial grounds in a short bench ruling. (Pet-App. 55–65.) The court concluded that the child's statements to medical providers about both assaults "were for the purposes of securing evidence to use in the prosecution of the defendant" and thus their admission at trial violated *Crawford*, and that the trial court erred in prohibiting impeachment of Dr. Schellpfeffer with the immunity grant. (Pet-App. 61.) The court did not address whether these errors were harmless as to any or all counts. (Pet-App. 55–65.)

The State appealed. The court of appeals, District II, reversed and directed the circuit court to reinstate Ramirez's conviction. *State v. Ramirez*, 2023 WI App 63, ¶ 1, __ Wis. 2d __, __ N.W.2d __ (Nov. 15, 2023). (Pet-App. 3–54.) In a published opinion[4] authored by Presiding Judge Mark D. Gundrum, the court concluded that Megan's statements made to the ER nurse and doctor during the medical examination were nontestimonial and thus did not implicate *Crawford*. These statements were nontestimonial because they were made for the primary purpose of medical treatment, not to

[4] The opinion was recommended for publication and ordered published December 21, 2023.

gather evidence for Ramirez's prosecution or to elicit a substitute for trial testimony. (Pet-App. 40, 43–45.)

The court so concluded upon applying this Court's four factor test in *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256. (Pet-App. 39–45.) The State discusses this analysis in greater detail in the Argument section.

Turning to Megan's and her little brother's statements to law enforcement, the court declined to address whether these statements were testimonial because, even if they were, their admission was harmless error. (Pet-App. 45–51.) The court concluded that Megan's law enforcement statements were duplicative of her properly admitted statements to the ER nurse and doctor. (Pet-App. 46–47.) Moreover, the two counts on the 1999 assault were proven by DNA testing establishing that Ramirez's semen was found on Megan's private parts following the 1999 assault—and Ramirez had no plausible explanation for how it got there.[5] (Pet-App. 47–48.) Finally, as three doctors testified, the nature of Megan's vaginal cut in 1998 was consistent with a penetrative injury and not falling onto the edge of a bathtub. (Pet-App. 48–49.) Moreover, though Cynthia said that she coached Megan to lie about the 1999 assault, she had no explanation for Megan's statements to the ER nurse about the 1998 assault. (Pet-App. 49.)

The court of appeals thus concluded that there was no reasonable probability that the verdicts in the case would have been different if Megan's and her younger brother's statements to law enforcement had not been introduced at trial. (Pet-App. 51.)

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[5] Though Cynthia insisted at trial that she made up the allegations and coached the children to lie, she denied planting Ramirez's semen on Megan's body. (Pet-App. 48 n.15.)

As to the court's ruling prohibiting cross-examination of Dr. Schellpfeffer on his grant of immunity, the court noted that the State conceded that the circuit court erred but maintained that the error was harmless. (Pet-App. 51–52.) Assuming without deciding that the court erred, the court of appeals agreed with the State that any error was harmless. (Pet-App. 51–52.) The court concluded that any attempted impeachment of Dr. Schellpfeffer with the immunity grant would not have made a difference. (Pet-App. 52.) No matter Schellpfeffer's credibility, his testimony that the assault was consistent with a penetrative assault and not a bathtub fall was duplicated by two other doctors who had reviewed the medical records. (Pet-App. 52–53.) Moreover, the injuries—a substantial cut to the lower vagina and perineum with no surface bruising—were so unlike the injuries one would sustain falling in a straddle position onto the edge of a tub that, once Megan disclosed that Ramirez caused the injury by forcing his penis inside of her, the bathtub fall story was no longer plausible. (Pet-App. 53.)

Ramirez requests review.

ARGUMENT

This Court should decline review because the ER examination of Megan was not a "joint medical/criminal investigation" presenting the issues raised by such cases, and the court of appeals reached the correct result.

A. Introduction

In the Seventh Circuit, the issue in Ramriez's case was whether postconviction counsel was ineffective for not raising a confrontation claim in 2005 after the U.S. Supreme Court issued its decision in *Crawford*. The unraised *Crawford* claim was clearly stronger than the claims counsel actually raised, so the Seventh Circuit concluded that counsel was ineffective for not raising it. The Court explicitly declined to decide the

Crawford claim itself on the merits, leaving the issue for the state courts to resolve in a new direct appeal. (Pet-App. 67–68, 85–86, 91.)

The circuit court granted Ramirez's new trial motion in a brief oral ruling. The court's discussion of the facts was cursory, it did not apply this Court's controlling standard in *Mattox*, and it did not address the issue of harmless error—*even* as to the two counts on the 1999 assault in which DNA testing showed that Ramirez's semen and sperm cells were found on Megan's private areas. (Pet-App. 55–65.)

By contrast, the court of appeals carefully examined the trial record, and it applied *Mattox*'s four-part test to those facts in determining that Megan's statements to ER personnel during the examination for the 1999 assault did not implicate *Crawford*. Critically, as to the two counts from the 1998 assault, the court relied on the undisputed fact (Pet. 9–10) that the officer had left the room when Megan disclosed to her mother and the ER nurse that Ramirez caused her 1998 vaginal injury. The court then concluded that, even if the eight- and five-year-old children's statements to law enforcement were testimonial, their admission was harmless error because Megan's statements to law enforcement about the 1998 and 1999 assaults were duplicative of her admissible statements to the ER nurse and doctor, and the counts on the 1999 assaults were proven by DNA evidence.

This Court should decline review. The medical examination in the ER was not a "joint medical/criminal investigation," and this case is a poor vehicle to address the distinct issue of whether a victim's statements made to a sexual assault nurse examiner (SANE nurse)—a professional who wears "two hats," medical and investigatory, and works closely with police to obtain evidence—is testimonial. Moreover, review is not warranted because Ramirez's claims may largely be resolved on harmless error grounds. The court of appeals also reached the correct result in a thorough, well-

reasoned opinion that is consistent with the precedents of this Court and the U.S. Supreme Court. Finally, the trial court's prohibiting impeachment of Dr. Schellpfeffer with the grant of immunity was also harmless error, and Ramirez only seeks error correction in challenging this ruling.

B. A statement's primary purpose determines whether it is testimonial and implicates the confrontation right, and statements to medical professionals in the course of receiving treatment are not testimonial.

In 2004, the United States Supreme Court held in *Crawford* that admission of out-of-court "testimonial" statements of a witness who is unavailable for cross examination violates one's Sixth Amendment right to confront witnesses against them at trial. *See Crawford*, 541 U.S. at 59–63. *Crawford* expressly declined to provide a comprehensive definition of "testimonial" but said that it includes, at least, statements in court proceedings and police interrogations. *See* 541 U.S. at 68.

In *Davis v. Washington*, 547 U.S. 813, 826–27 (2006), the court first employed the "primary purpose" test for evaluating when statements are testimonial. The Court concluded that Davis's statements on a 911 call in response to the operator's were not testimonial because the "primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." *Id.* at 822, 826–27.

In *Michigan v. Bryant*, 562 U.S. 344, 349 (2011), the Court stated that the "primary purpose" test has general application and is not only used in cases of an on-going emergency, contrary to Ramirez's suggestion otherwise. (Pet. 19–20.) *Bryant* involved another emergency situation—a victim's statements to police while lying on the ground with a gunshot wound—and the Court concluded these statements were not testimonial. But the Court explained that "there

may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358.

One of these circumstances is medical examinations. *Bryant*, 562 U.S. at 362 n.9 (citing *Giles v. California*, 554 U.S. 353, 376 (2008)). "[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules." *Giles*, 554 U.S. at 376.

The Court in *Bryant* also clarified that the primary purpose test considers what reasonable participants in the conversation—*both* declarant *and* questioner—would view as the primary purpose of the statement based on the circumstances. *Bryant*, 562 U.S. at 367. Finally, the *Bryant* Court indicated that a declarant's capacity to intend to make a testimonial statement is relevant to the statement's primary purpose—in *Bryant*'s case, whether his medical condition likely prevented him from forming a testimonial purpose. *See Bryant*, 562 U.S. at 364–65.

Most recently, in *Ohio v. Clark*, 576 U.S. 237 (2015), the Supreme Court addressed the issue of a declarant's capacity to have a testimonial purpose when the declarant is a young child. There, the Court concluded that a three-year-old declarant lacked the mental capacity to make a testimonial statement, so the child's statement to his teachers identifying his mother's boyfriend as his abuser was not testimonial. "Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution," admission of the child's statements at trial did not violate the Confrontation Clause. *Clark*, 576 U.S. at 240. The Court added: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." *Id.* at 247–48. "'[H]av[ing] little understanding of prosecution' . . . . it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony." *Id.* at 248 (citation omitted).

As discussed later, this Court has adopted from *Ohio v. Clark* a four-part test for Wisconsin courts to use in determining whether a statement's primary purpose is testimonial. *See Mattox*, 373 Wis. 2d 122, ¶ 32.

C. The ER examination was not a "joint medical/criminal investigation," and this case is a poor vehicle for this Court to address the issue of whether statements made in such investigations are testimonial.

Ramirez casts the ER examination of Megan as a "joint medical/criminal investigation" like that of a SANE nurse's examination of a sexual assault victim. (Pet. 19–23.) He asserts that statements obtained during such joint investigations "present thorny confrontation issues," and that this Court is the proper court to address such issues. (Pet. 19–23.) He suggests that, despite the length of the court of appeals' decision, its analysis was insufficient to address the complexities of this issue. (Pet. 6, 22–23.)

But the ER nurse's and doctor's medical examination of Megan was not, as Ramirez claims, a "joint medical/criminal investigation" and is distinguishable from such "joint" investigations. The court of appeals did not address the difficult issues of such investigations because they are not presented here, and this case is the wrong vehicle in which to address them.

All the cases Ramirez cites in discussing "joint medical/criminal investigatory statements" of crime victims involve examinations by medical professionals for whom investigating crimes and evidence collection is a primary job responsibility, like SANE nurses[6] and child welfare

[6] A SANE nurse is a sexual assault forensic examiner with specialized training from the Wisconsin Department of Justice to

advocates. *See State v. Nelson*, 2021 WI App 2, 395 Wis. 2d 585, 954 N.W.2d 11 (SANE nurse); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008) (same); *Hartsfield v. Com.,* 277 S.W.3d 239 (Ky. 2009) (same); *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) (SANE-like nurse practitioner with evidence collection duties); *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009) (social worker employed by family services agency); *State v. Arnold*, 933 N.E.2d 775 (social worker in child advocacy center); *State v. Hooper*, 176 P.3d 911 (Idaho 2007) (nurse and forensic examiner).

None of Ramirez's cited cases closely resemble the facts of this case, which demonstrate that the ER examination was a medical examination, not a joint medical/criminal investigation for the following reasons.

First, the ER nurse and doctor were emergency room medical providers, not SANE nurses with the dual mission of providing medical care and investigation, or child welfare advocates with investigatory responsibilities and limited medical training.

Second, Megan had an acute need for immediate medical treatment at the time. Ramirez suggests that she had no need for medical treatment because she had no apparent

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"perform the medical forensic exam, gather information for the medical forensic history, collect and document forensic evidence, and document pertinent physical findings from patients." Wisconsin Department of Justice, "Sexual Assault Nurse Examiner Program," doj.state.wi.us/dies/sexual-assault-nurse-examiner-program (accessed February 2, 2024). Among a SANE nurse's express functions is to collect evidence for use in criminal prosecutions. *See State v. Nelson*, 2021 WI App 2, ¶ 42, 395 Wis. 2d 585, 954 N.W.2d 11. Of course, the State does not concede here that a victim's statements to a SANE nurse are testimonial. The point is only that Megan's medical examination wasn't a "joint medical/criminal investigation"; the ER providers who conducted the medical exam were not SANE nurses with express investigatory job responsibilities.

"physical injuries." (Pet. 23–24.) But Cynthia suspected and Megan (and then DNA evidence) confirmed that Ramirez had sexually assaulted her earlier that night. Even though the officer drove the mother and child to the ER, a medical facility was *the only reasonable place* for Megan to be at the time. That Megan needed immediate medical care is another ground that distinguishes this case from two of the cases Ramirez cites. *See Bobadilla*, 575 F.3d at 787 (exam by social worker occurred five days after the assault); *Arnold*, 933 N.E.2d. at 777 (exam was the day after the assault).

Third, the trial record shows that the responding officer had little to no involvement in the ER nurse's and doctor's examination of Megan. Granted, the officer was present for some portion of the exam. (Pet-App. 5.) But neither the nurse nor the doctor even mentioned in trial testimony the officer's presence in the room, much less said that he was involved in or directed the examination. (R. 462:96–105; 551:21–31.) While the responding officer testified that he used a Teddy bear to have Megan show where Ramirez touched her (Pet-App. 5), this account was not repeated by the medical providers. Both the nurse and doctor had their own, detailed accounts of how Cynthia and Megan disclosed the assaults *to them* during the medical examination, and these accounts did not involve the officer. (R. 462:96–105; 551:21–31.)

Fourth, even if the officer had some further involvement in the medical examination not disclosed by the record, it is undisputed (Pet. 9–10) that he had left the room (R. 551:130) by the time Megan disclosed to her mother and the nurse that the vaginal injury she suffered in 1998 was caused by Ramirez's penis-to-vagina assault, not by a bathtub fall. And the nurse's question that elicited the disclosure, "if this was the first time something like this had happened," was a part of her duty to ascertain the child's history relevant to the circumstances for which she was receiving treatment. (Pet-App. 7.) As the court of appeals explained: "Specific to child

sexual abuse, when a child presents with alleged sexual abuse, certainly it is important for the medical provider to know if, how, and when the child may have been abused before in order to properly address the child's present physical and psychological health." (Pet-App. 44.) "It would be a poor medical professional indeed who upon a patient presenting medical complaints did not inquire about relevant history." (Pet-App. 45.)

Finally, the fact that the officer drove the child and mother to the ER and had an investigatory purpose in doing so did not transform the ER medical examination into a "joint medical/criminal investigation" like those Ramirez seeks to link his case to. Again, Megan needed to be seen by a medical professional, no matter who drove her there. The officer's interaction with Megan in the hospital appears to have been limited to the brief "Teddy bear" interview. (R. 551:130–32.) From the medical providers' accounts, which do not mention the officer's presence, it appears that this interaction did not involve them. (R. 462:96–105; 551:21–31.)

And the officer had left the exam room by the time Megan made the disclosure that led to the two counts on the violent 1998 assault.

For these reasons, the ER medical examination was not a "joint medical/criminal investigation," and it does not raise the perhaps closer questions associated with such investigations. Review of this case will not resolve the "thorny" issues of whether statements to SANE nurses and child advocacy center workers implicate the Confrontation Clause. This case has much narrower application—and the court of appeals' decision carefully and correctly resolved the confrontation issues in this case.

D. The Court should deny review because Ramirez's claims may be resolved on harmless error grounds.

Like Ramirez, the State asks this Court to consider harmless error in deciding whether to take review. An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). Harmless error has broader application to his case than Ramirez admits, and this is another reason why this case is the wrong vehicle to address the issues raised in his petition.

Harmless error as to the 1999 assault counts

The State disputes Ramirez's assertion that "harmless error does not enter the picture" unless this Court concludes that Megan's statements in the hospital were not testimonial. (Pet. 18.) Of course, the State believes and the court of appeals properly concluded that Megan's statements to the ER nurse and doctor during the medical examination were not testimonial. (Pet-App. 40–45.)

But even if *all* of Megan's statements in the medical exam were testimonial, and even if, as the court of appeals assumed without deciding, that her statements and her younger brother's statement to law enforcement were also testimonial, the error in admitting these statements would still be harmless beyond a reasonable doubt regarding one of the two sets of charges.

As to the counts of first-degree sexual assault of a child and child enticement stemming from the 1999 assault, these two counts were proven by DNA evidence showing that Ramirez's semen and sperm cells were found on Megan's private areas and underwear. (Pet-App. 31, 47 n.14.) Additionally, admissible evidence—Cynthia's statements to law enforcement on the night of the assault—was presented

at trial that explained when, where, and how Ramirez assaulted Megan. (Pet-App. 4–5.) Moreover, the defense had no plausible explanation for how Ramriez's semen and sperm cells were found on Megan's body. Despite Cynthia's testimony that she made up Megan's allegations of assault, Cynthia repeatedly testified that she did not plant her husband's semen on Megan's privates. (Pet-App. 24, 48 n.15.) Collectively, this evidence demonstrates that, even if Megan's statements to medical providers and law enforcement were testimonial and thus inadmissible, the error in admitting these statements was harmless beyond a reasonable doubt.

Harmless error as to the 1998 assault counts

Likewise, as to the counts of first-degree sexual assault with great bodily harm and first-degree sexual assault of a child stemming from the 1998 assault, not all of Megan's statements to the ER nurse and doctor need to be nontestimonial for harmless error to apply.

Even if this Court were to assume that Megan's statements made when the officer was in the examination room were testimonial, everyone agrees that the officer was *not* in the room when Megan disclosed to her mother and the nurse that Ramirez caused her 1998 vaginal injury by raping her. (Pet. 9–10.) As discussed, the nurse asked Megan if this was the first time this had happened so as to obtain relevant medical history from Megan and to uncover the extent of her physical and emotional injuries. Had the officer asked the question, its purpose would have been different. But he wasn't there, and nothing in the record suggests that the nurse asked the question on the officer's direction. Megan's response to the nurse's question was not testimonial.

The evidence that Megan's injuries were caused by Ramirez raping her and not a bathtub fall was supported by common sense and medical expert testimony. As the court of appeals explained, the medical record evidence described a

two- to two-and-a-half centimeter cut to the eight-year-old's lower vagina and perineum resembling an episiotomy. (Pet-App. 32.) Three medical experts testified that the injury was consistent with a penetrative assault, not the bathtub fall the family had reported. (Pet-App. 9–10, 31–35.) The defense presented no expert testimony that the injuries could have been caused by a straddle impact onto the edge of the tub.

Once Megan told her mother and the nurse that Ramirez caused the injury by forcing his "pee-pee" into her, the bathtub fall story was no longer plausible. (Pet-App. 53.) Thus, even if error, admission of Megan's statements to law enforcement about the 1998 assault—which duplicated Megan's statement to the nurse—*and* Megan's statements to medical personnel while the officer was present in the room were harmless beyond a reasonable doubt.

In sum, the court of appeals applied harmless error only to admission of the statements to law enforcement after concluding that Megan's statements to medical providers in the examination were nontestimonial. But the record shows that, even if error, admission of *all* the statements to medical professionals as to the 1999 assault counts, and all of the statements except Megan's disclosure to the nurse of the cause of her vaginal injuries as to the 1998 assault counts was harmless error beyond a reasonable doubt. Because Ramirez's claims may be resolved by application of harmless error, this Court should decline review.

E. The court of appeals correctly applied *Mattox*'s four-factor test in concluding that Megan's statements to the ER nurse and doctor were not testimonial.

In *Mattox*, this Court relied on *Ohio v. Clark* in adopting a four-factor test for determining whether a statement is testimonial. 373 Wis. 2d 122, ¶ 32. These factors are: (1) the formality of the situation producing the statement, (2)

whether the declarant makes the statement to law enforcement, (3) the age of the declarant, and (4) the context in which the declarant makes the statement. *Id.* The court of appeals reasonably and correctly applied this test in concluding that Megan's statements to the ER nurse and doctor in being treated for a sexual assault were not testimonial.

First, the court concluded that the statements and setting—those of an eight-year-old patient made to medical providers in connection with an ER examination—were informal, and thus more likely to be nontestimonial. (Pet-App. 41.) Second, Megan's statements were not made to law enforcement, and therefore were more likely nontestimonial. (Pet-App. 41.) Third, Megan's age also suggested that her statements were nontestimonial because an eight-year-old probably would not know that her statements to a doctor and a nurse in an exam might be used later to prosecute someone, relying on principles in *Clark*. (Pet-App. 41–42.) Fourth and finally, the court concluded that the context of the statements—an ER medical examination of an eight-year-old child for a sexual assault occurring earlier that night—also indicated that the statements were nontestimonial, citing *Giles*, 554 U.S. at 376 ("'[S]tatements to physicians in the course of receiving treatment' generally will not be precluded by the Confrontation Clause.") (Pet-App. 43.) "Megan made her statements in an ER to two medical professionals who were clearly showing concern for her health and providing her with care," the court explained. (Pet-App. 43.) "Megan, and any other eight-year-old girl in her position, would have answered their questions believing that by doing so she was facilitating their efforts to address her health needs." (Pet-App. 43.)

The court rejected Ramirez's argument that Megan's statements in the ER were made for the primary purpose of gathering evidence against Ramirez because the nurse put

down in writing Megan's statements about the assaults and turned the document over to police. (Pet-App. 42 n.10.) The court properly concluded that this act—which ensured the nurse's compliance with her legal duty as a mandatory reporter to provide authorities with information of suspected child abuse—did not show that Megan's statements at the hospital were made for the primary purpose of prosecuting Ramirez. (Pet-App. 42 n.10.)

For these and other reasons discussed in the decision, the court of appeals properly concluded that Ramirez's statements to an ER nurse and doctor in being treated for a sexual assault were not testimonial. Review is not warranted.

F. Ramirez seeks only error correction in asking this Court to accept review to address the court of appeals' conclusion that the trial court's order prohibiting impeachment of Dr. Schellpfeffer with the grant of immunity, if error, was harmless.

Finally, the court of appeals properly concluded that, assuming that the trial court erred in prohibiting cross-examination of Dr. Schellpfeffer's grant of immunity from prosecution for not reporting the 1998 injuries as suspected child abuse, the error was harmless beyond a reasonable doubt. (Pet-App. 51–52.) But even if defense counsel had undermined Dr. Schellpfeffer's own credibility with such questions, his testimony about the likely cause of Megan's 1998 injury was duplicated by two other doctors who examined the medical reports. (Pet-App. 53.)

The error was harmless beyond a reasonable doubt for this reason and others stated in the court of appeals decision. (Pet-App. 51–53.) Review is inappropriate on this issue because Ramirez seeks only error correction.

CONCLUSION

This Court should deny review.

Dated this 5th day of February 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 5,721words.

Dated this 5th day of February 2024.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of February 2024.

Electronically signed by:

Jacob J. Wittwer
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