

No. 13-1352

IN THE
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DARIUS CLARK,

Respondent.

**On Writ of Certiorari to the
Supreme Court of Ohio**

**BRIEF *AMICUS CURIAE* FERN L. NESSON
AND CHARLES R. NESSON
IN SUPPORT OF RESPONDENT**

FERN L. NESSON
5 Hubbard Park Lane
Cambridge, MA 02138
617-495-4609
fnesson@commschool.org

CHARLES R. NESSON
Counsel of Record
1575 Massachusetts Ave
Cambridge, MA 02138
617-495-4609
nesson@gmail.com

*Counsel for Amicus Curiae
Fern L. Nesson and Charles R. Nesson*

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INTEREST OF THE AMICUS CURIAE

The undersigned Charles R. Nesson, is the Weld Professor of Law at Harvard University whose specialty is Evidence and the law of juries. His interest in this case stems from the fact that Confrontation is a central feature of his subject.

The undersigned Fern L. Nesson is a criminal appellate lawyer, formerly the chief of the appellate

office of the Massachusetts Defenders Committee. Her interest is in constitutional and criminal law.¹

ARGUMENT

This case presents an opportunity for the Supreme Court to survey the confusion its confrontation doctrine has generated and to set the doctrine right. Confrontation in its archetypal form—where a victim accuses the defendant of a crime in open court before a judge and jury—is the dramatic core of an American criminal trial. Whenever the Court has had the occasion to give weight to the Confrontation Clause, it has chosen to eviscerate the essential right of confrontation instead. What was meant to be a critical constraint upon the state, ensuring that accusations of a crime leveled against a citizen be made live in court, has instead been interpreted to permit out-of-court accusations and proof by hearsay alone. We argue in this brief that the Court should use the opportunity that this case presents to reinterpret the right of confrontation so as to align with its historical and constitutional roots.

¹ Several Harvard Law Students have contributed to the crafting of this amicus brief. Thanks to Tobyn Aaron, Dan Bogden, Suria Bahadue, Sandra Hough, Brook Jackling.

I. OHIO V. CLARK PRESENTS THIS COURT WITH THE OPPORTUNITY TO INTERPRET CONFRONTATION DOCTRINE TO REQUIRE THE PROSECUTION TO CONFRONT THE DEFENDANT WITH SUFFICIENT LIVE TESTIMONY FROM PERSONAL KNOWLEDGE.

The current state of confrontation law requires judges in all of the state and federal courts to exclude from evidence any hearsay that is “testimonial.” *Crawford v. Washington*, 541 U.S. 36, 36 (2004). The case currently before this court involves the admissibility of statements made by an abused child to the child’s teacher, the issue being whether the fact that the teacher is a mandated reporter renders her report of his statements inadmissible because they are “testimonial.” A compelling dissent in the court below pointed out the stupidity of disqualifying testimony by mandated reporters, they being the people professionally trained to look out for abused children. There is no good reason why a child abuser’s conviction should turn on whether or not the child’s teacher is a mandated reporter; and no good reason why the Supreme Court should be telling state judges, using the authority of the Constitution, how to rule on hearsay objections to the admissibility of evidence.

Confrontation cases fall into two categories. In one category are the cases in which the non-hearsay and circumstantial evidence against the defendant is sufficient to convict. In this category, hearsay may corroborate the prosecution’s case but is not essential to it. This means that, even without the hearsay, the prosecution would survive a motion for dismissal at the close of the prosecution’s case.

The second category consists of cases in which there is a hole in the prosecution's proof that it tries to fill with hearsay. Without the hearsay, the prosecution's case is legally insufficient. In this category, the hearsay, if admitted in evidence, is not merely corroborative of an otherwise sufficient case, but rather is essential to it. The admission of hearsay in such a case as a substitute for live testimony should violate the Confrontation Clause.

Focusing on this distinction immediately suggests the wisdom of rethinking confrontation doctrine to require the prosecution to confront the defendant with a solid case comprised of live personal-knowledge testimony, with hearsay evidence, if admitted, as corroborative only.

Ohio v. Clark, 999 N.E.2d 592 (Ohio 2013), *cert. granted*, 135 S.Ct. 43 (2014), is an example of a case in the first category. The prosecution's evidence in *Clark*, even without the child's hearsay as reported through the testimony of the mandated reporter, was strong enough to reach a jury. The child's mother testified that when she left the child in the defendant's care at 1 a.m. the previous morning, the child was uninjured. The mother also testified that she did not return until late the next day. The child's teacher testified that the defendant dropped the child off at school at noon on the day in question. At that time, she noticed the child's injuries. A second teacher testified that, when Clark picked up the child from school, she asked him about the injuries. Instead of responding, he grabbed the child and fled so fast that the teacher was unable to take down his license plate number. Though not perhaps a strong case, a jury could reasonably infer from this evidence both opportunity and consciousness of guilt on the part of the defendant. Given the

testimony of live witnesses with which the state confronted the defendant, the hearsay admitted against him was corroborative. Although likely important to the jury in coming to its verdict, the hearsay was not legally essential.

Treating the Confrontation Clause as a constitutional mandate to require judges in state trials to exclude such non-essential hearsay makes no sense, and gives up the true office of the clause, which is to require conviction based on live witnesses confronting the defendant from personal knowledge. The essential question is whether there is good solid evidence independent of the hearsay or whether there is not. This was issue in Raleigh's case and it remains the issue for the Court today.

II. UNDERSTANDING RALEIGH'S CASE IS NECESSARY TO UNDERSTANDING THE TRUE IMPORT OF THE CONFRONTATION CLAUSE.

The Raleigh case exemplifies the legal concept of confrontation and speaks to the most fundamental fear of a citizen vis-à-vis the state: that of false conviction. King James I allegedly disposed of Raleigh, a political enemy, by rigging a case against him for treason. Lord Coke prosecuted the case, offering "proof" of Raleigh's crime in the form of an unsworn, unsigned statement by Raleigh's friend, Lord Cobham, who was incarcerated in the Tower of London. In the statement, Cobham accused Raleigh of planning to kill the King and soliciting Cobham's participation in the scheme. Raleigh demanded that Cobham be brought to court to accuse him in person.

Coke refused to produce Cobham and instead submitted the statements of several other out-of-court

declarants, none of whom had any personal knowledge of Raleigh's actions in the alleged conspiracy. When pressed again by Raleigh to produce Cobham—or any witness who could testify from personal knowledge, Coke offered only more hearsay to corroborate Cobham's purported accusation. Coke called Dyer, the pilot of a channel-crossing boat, who testified that a passenger on the boat said: "Your King [James] shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned." Raleigh objected again: This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me? If you proceed to condemn me by bare inferences . . . without witnesses . . . you try me by the Spanish inquisition." Jardine, *Criminal Trials*, Vol.1 (1849) at 418, 436.

Dyer was the only witness who appeared live in court to testify against Raleigh—and his evidence was hearsay. Based solely on hearsay evidence, Raleigh was convicted and executed. The outrage engendered by Raleigh's conviction and execution motivated the subsequent enshrinement of the right of confrontation in our Bill of Rights.

In order to properly understand the confrontation concept that is Raleigh's legacy, it is necessary to identify the basis of Raleigh's objection. Raleigh was demanding that Cobham be produced live in court to testify against him. Cobham was the only person who could speak from personal knowledge as to Raleigh's part in the alleged conspiracy. Raleigh knew that Cobham had not signed and then had retracted the confession that implicated him. He was counting on his belief that Cobham would refuse to accuse him in sworn testimony in court and, instead, would disavow his statement.

Put another way, Raleigh was asserting that the prosecution must offer “proof” in the form of a live witness who testifies at trial from personal knowledge. Coke’s refusal to produce Cobham meant that the *only* proof against Raleigh was hearsay. The absence of a live accuser and the substitution of hearsay left the jurors with no way to judge the truthfulness of Cobham’s accusation against Raleigh and therefore no way to reach a conviction beyond a reasonable doubt. In consequence, the public was left with a verdict riven with unresolved doubt and an execution that could only be understood as injustice. This injustice lay in the failure to produce any live witness with personal knowledge to accuse him in court. It was the insufficiency in the totality of the evidence presented that rankles, not the admission of any particular hearsay statement.

The lesson of Raleigh’s case is plain: a defendant should not be convicted unless the prosecution produces witnesses with personal knowledge who appear in court to testify to each element of his offense. Only the production of live witnesses can satisfy the need for confrontation. If the prosecution is permitted to substitute out-of-court statements for in-court accusations, it can manufacture them. The jury needs to see the accuser so that it can assess the truth of the accusation. Without that, there is no way for a jury to reach a verdict beyond a reasonable doubt.

Perhaps just as important, the public needs to know that the jury has had the opportunity in order to trust the verdict. With no one present or willing to swear before the defendant and the jury that Raleigh was a traitor, the public could never be convinced that his execution was fair.

It is equally important to understand what Raleigh's case was *not* about. Cross-examination, or the lack thereof, was not an issue in Raleigh's case. In Raleigh's time, there was neither a right to counsel nor a right to cross-examine witnesses. Raleigh was not asking that he be permitted to cross-examine Cobham. He was instead asserting that, without Cobham present to accuse him to his face, there was no lawful proof of his crime.

Properly understood, the injustice of Raleigh's trial could be cured only by production of a live witness at trial. It could not be cured by substituting "good" hearsay, however reliable the state might consider it to be. Even if the hearsay is in the form of a sworn affidavit or has been previously cross-examined in another forum, the use of an out-of-court statement to prove an essential element of the offense falls short of our now constitutionally-enshrined requirement that defendants be confronted with the witnesses against them. That is the protection that confrontation provides to a defendant and that is what a jury needs to warrant its verdict.

III. THE CONFRONTATION CLAUSE IS A PRODUCTION REQUIREMENT, NOT A RULE OF EVIDENCE.

The Confrontation Clause should not be understood as a "testimonial" hearsay rule. The prosecution meets its responsibility under the Confrontation Clause when it produces witnesses live in court whose testimony from personal knowledge addresses each element of the charged offense. The clause is not directed to resolving the admissibility of specific out-of-court statements. That issue is governed by hearsay law. Whether the prosecution has met its responsibility under the Confrontation Clause cannot

be resolved by admissibility decisions on specific offers of evidence. The admissibility of any particular item of evidence must be decided according to the rules of evidence. On the other hand, whether there has been sufficient confrontation must be decided instead upon review of the state's whole case. If, at the point in the trial when the state rests its direct case, the prosecution has failed to present a live witness to testify from personal knowledge on any essential element of the offense, a constitutional confrontation error has occurred. Another way of saying this is that a conviction may not rest on hearsay alone.

A. Cross-examination Is a Different Right that Works in Tandem with Confrontation.

Confrontation happens when a witness testifies on direct examination, not during cross-examination. To be sure, the defendant has a constitutional right to cross-examine the witnesses that the prosecution calls to testify against him. But that right does not derive from the Confrontation Clause. In the plain language of the clause, the defendant has the right to "*be confronted with* the witnesses against him," not the reverse.

The defendant's right to cross-examine applies to all of the witnesses called by the prosecution. It is a right independent of the Confrontation Clause. Taken together with the production requirement of confrontation, the two rights ensure that the jury will 1) hear the personal knowledge testimony of witnesses sufficient to convict the defendant, and 2) see those witnesses and all witnesses called by the prosecution tested for credibility through cross-examination. These two distinct constitutional rights enable the jury to decide the case.

To illustrate the distinction in source and reach of these two distinct rights, consider an extreme hypothetical in which the prosecution produces no witnesses whatsoever. Judicial refusal to dismiss this case would violate the defendant's right to be confronted with the witnesses against him, but there would be no violation whatsoever of a right to cross-examine because no witnesses have testified.

Consider an alternative example in which the prosecution's only evidence is hearsay reported by a witness who is cross-examined before the jury. The defendant's right of confrontation has been violated, but not his right of cross-examination. The defendant has no right to cross-examine the hearsay declarant who is not present in court.

If, in response to the defendant's confrontation objection, the prosecutor calls the hearsay declarant to the stand, then the defendant will have a constitutional right to cross-examine him, like any other witness called by the prosecution, but it is the Confrontation Clause which has done the work of bringing him in. Cross-examination is background procedure applicable to all live testimony. The right to cross-examine a witness who appears at trial does not, in and of itself, limit what that the witness may say. Whatever the witness says, he is on the stand and can be cross-examined about it. If the witness relates a statement by an out-of-court declarant, it is hearsay law that governs the admissibility of that statement, not the Confrontation Clause, and not any constitutional right of cross-examination of the absent declarant, however derived.

When hearsay is the sole proof offered on an element of the offense, there has been a failure to produce a live witness to accuse the defendant based upon personal

knowledge. This gap requires dismissal of the prosecution's case for failure to meet the confrontation requirement. It also means that the declarant of the hearsay offered in substitute for live testimony cannot be cross-examined, but this gives no reason to invent a redundant constitutional right to cross-examine unproduced out-of-court declarants. Confrontation solves the problem.

To derive the right to cross-examine from the Confrontation Clause instead of from the right to counsel invites the confusion between confrontation and hearsay that plagues the Supreme Court to this day. It perpetuates the misconception that the admission at trial of the statements of an absent declarant who has been cross-examined by the defendant at some point in the past negates the prosecution's obligation to produce that declarant live at the defendant's trial. So too, it leads to the misconception that out-of-court statements that hearsay law deems admissible as exceptions to the hearsay rule may satisfy the prosecution's obligation to produce the declarant live at the defendant's trial.

Further, it makes the present case and others like it insoluble. In child abuse, and other domestic violence cases, where the victim does not appear due to legal incompetence (or plain unwillingness) to testify, a testimonial analysis allows the admissibility of the victim's out-of-court accusations to turn on his or her intent in making them. Putting aside the difficulty of ascertaining a victim's intent and the variety of divergent rulings that result from trying to determine it, the testimonial standard results in decisions as bad as those under *Ohio v. Roberts*, 448 U.S. 56 (1980). Instead of requiring the witnesses with personal knowledge to make the case, the testimonial standard

permits the introduction of hearsay at trial to substitute for solid proof. Under the current standard, a defendant may be convicted based upon hearsay alone just as was Sir Walter Raleigh.

B. The Confrontation Clause Is Not an Evidentiary Rule of Hearsay Raised to Constitutional Level.

The Confrontation Clause does not govern a trial judge's rulings as to the admissibility of evidence as it is offered. It is a production rule, not an evidentiary rule of admissibility, and, as such, it is only at the close of the prosecution's case that the judge is able to determine whether the requirements of the clause have been met. If the prosecution has presented sufficient live witnesses who speak from personal knowledge, the defendant has been adequately confronted and the case may go to the jury. If it has not, the judge must dismiss the charge against the defendant. If the prosecution produces live witnesses sufficient to prove its charge, it fulfills its responsibility to confront the defendant quite apart from the reliability of the testimony. All credibility issues and all reasonable inferences from the witnesses' testimony are left to the jury. Reliability is not a confrontation requirement.

The defendant's confrontation objection is an assertion of the insufficiency of the prosecution's entire case. That is why it is properly made when the prosecution rests. The defendant's hearsay objections, in contrast, relate to the admissibility of specific out-of-court statements offered for their truth without opportunity to cross-examine the declarant. Evidentiary rulings on hearsay objections can and should be made as the trial progresses. Just as the judge is not deciding confrontation issues when she

rules on the admissibility of specific evidence, she is not making a hearsay ruling when she decides, at the end of the direct case, whether the prosecution has offered enough live testimony to send the case to the jury.

IV. CRAWFORD CONFUSES CONFRONTATION WITH CROSS-EXAMINATION, MISINTERPRETS THE REQUIREMENTS OF THE CONFRONTATION CLAUSE, AND PERMITS DEFENDANTS TO BE CONVICTED UPON HEARSAY ALONE. IT SHOULD BE OVERRULED.

The *Crawford* Court overruled *Ohio v. Roberts* with good reason, but it then simply conflated confrontation with hearsay in a new way. Justice Scalia, announcing the “testimonial” standard, asserted that the purpose of confrontation is to test the reliability of witnesses by cross-examination. The clause’s “ultimate goal,” Justice Scalia says, is to assure “testing in the crucible of cross-examination.” *Crawford*, 541 U.S. at 61. This transforms confrontation into a hearsay rule. But the clause speaks to the defendant’s right to *be confronted with* witnesses, not to the defendant’s right to test them. *Id.* at 42. Justice Scalia interprets “witnesses” in the phrase “the witnesses against” to include not only the witnesses who come to court to testify against the defendant at trial, but all out-of-court declarants who have made “testimonial” statements. *Id.* at 40. The most plausible meaning of the “witnesses against” in the Confrontation Clause is that they are those persons who appear at trial to testify against the defendant. If, after the prosecution calls its last witness, there remains a gap in its case that has not been supported by live testimony from personal knowledge, it has failed to call a required “witness

against” and the defendant has been denied his right to confrontation.

The Court should overrule *Crawford* and return to the approach of *United States v. Kirby*, 174 U.S. 47 (1899). The *Kirby* opinion, written by the first Justice Harlan, represents a better understanding of the Confrontation Clause. Kirby was tried in a federal court for receiving and converting stolen postage stamps. 174 U.S. at 48–49. As proof that the stamps were stolen, the prosecution introduced evidence that the men who sold the stamps to Kirby had pleaded guilty to stealing them in a separate proceeding. *Id.* at 49. A federal statute purported to permit the introduction of this hearsay report of the conviction of the thief as conclusive evidence that the goods were stolen in a prosecution of the receiver. *Id.* at 54.

Justice Harlan held, for the Court, that this violated Kirby’s constitutional right to confrontation:

Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution [That] record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused . . . *except by witnesses who confront him at the trial*

Id. at 55 (emphasis added).

Kirby defines the prosecution’s responsibility under the Confrontation Clause as requiring the production

of live witnesses at trial who can testify from personal knowledge sufficient to prove the crime charged against the defendant, rather than interpreting it is a rule of evidence. *Id.* at 61. At Kirby's trial, the admission of the record of the convictions of other criminals in lieu of live testimony from a witness with personal knowledge of the theft was not a question of the admissibility of the hearsay testimony. That was permitted by the federal statute and the prosecution was entitled to use it as evidence corroborating live testimony offering proof as to the theft. Rather, it was the fact that the hearsay was the only evidence offered on the issue of theft that created a confrontation problem.

Returning to *Kirby* will right the ship. Confrontation analysis under a *Kirby* standard applies to the prosecution's case as a whole; it is a constitutional expression of one of the rights to a fair trial, assuring that no essential element of proof against an accused may be proved by hearsay alone. It is not a rule of admissibility with respect to specific kinds of hearsay statements, but rather a procedural rule of production by which the trial judge is to assess the quality and sufficiency of the prosecution's proof in total.

This interpretation of the Confrontation Clause makes not only linguistic but functional sense. It delineates the proper roles and functions of judge and jury at trial. It leaves to the judge all legal decisions on admissibility of evidence and the legal sufficiency of the prosecution's case. It leaves exclusively to the jury the determination of the credibility of the witnesses and the ultimate decision as to the defendant's guilt. Having heard live witnesses, the jury is enabled to decide beyond a reasonable doubt.

Perhaps equally important, the *Kirby* approach, in contradistinction to the testimonial standard, will separate confrontation from the “ganglia of hearsay,” *California v. Green*, 399 U.S. 149, 173 (1970). It is the proper province of the law of hearsay (backed up by due process and the right to counsel) to protect the defendant’s right to cross-examine an out-of-court declarant. Hearsay analysis at the time that an out-of-court statement is offered can be relied upon to weed out unreliable, un-cross-examined evidence from the jury’s consideration. Confrontation analysis at the close of the prosecution’s case will enforce a different requirement—the production of witnesses who testify from personal knowledge as to each element of the crime—thus ensuring that the defendant and the jury are presented with enough live evidence to support the charge.

CONCLUSION

Crawford’s “testimonial” approach just does not work. Like *Roberts*, it mixes up hearsay and confrontation law. It offers no clean definition of what “testimonial” means. It permits conviction based on hearsay alone. It claims to have history on its side but that history is one of persistent misunderstanding. It leaves Raleigh convicted even without Cobham if the statement by the boat pilot is deemed not “testimonial.” And in the present case, it would require that the victim’s identification of the defendant, given to a mandated reporter, be excluded despite the fact that the prosecution produced live witnesses who spoke from personal knowledge on each element of the offense.

Ohio v. Clark offers the perfect vehicle for the Court to reexamine and rectify its misreading of the Confrontation Clause in *Crawford* and to clear up the

confusion created in its wake. The Court should overrule *Crawford* and affirm the defendant's conviction in the present case.

Respectfully submitted,

FERN L. NESSON
5 Hubbard Park Lane
Cambridge, MA 02138
617-495-4609
fnesson@commschool.org

CHARLES R. NESSON
Counsel of Record
1575 Massachusetts Ave
Cambridge, MA 02138
617-495-4609
nesson@gmail.com

Counsel for Amicus Curiae
Fern L. Nesson and Charles R. Nesson

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