ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, Plaintiff-Appellee v. JAMES D. HOOD, Defendant-Appellant.	:	Case No. 2010-2260 On Appeal from the Cuyahoga County Court of Appeals, Eighth District Court of Appeals Case No. 93854

MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF MOTION FOR RECONSIDERATION OF APPELLEE STATE OF OHIO

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INTRODUCTION

The Court's recent decision in *State v. Hood*, 2012-Ohio-5559, rightly affirmed appellant James Hood's conviction. In doing so, the Court correctly held that cell-phone records are nontestimonial and therefore do not trigger a defendant's Sixth Amendment confrontation rights. The Court then concluded that although the cell-phone records were not properly authenticated at trial, that error was harmless due to overwhelming evidence of Hood's guilt.

Although these aspects of the *Hood* opinion are correct, the Attorney General nevertheless joins the State in urging the Court to reconsider part of its opinion because, left unchanged, it will constitutionalize every hearsay violation. The Court acknowledged that cell-phone records are generally non-testimonial business records. But it also said these records are nontestimonial *only* if they are properly authenticated. In other words, any time nontestimonial evidence is admitted in violation of hearsay rules, the evidence *becomes* testimonial and therefore violates both the rules of evidence *and* the Confrontation Clause. This aspect of the Court's opinion should be modified because it both conflicts with current United States Supreme Court precedent and will fundamentally disrupt criminal appeals in Ohio.

The *Hood* opinion directly contradicts existing United States Supreme Court precedent by constitutionalizing every hearsay violation. As explained below, the Supreme Court has clearly indicated that hearsay violations and confrontation violations are separate and distinct. Compliance with hearsay rules is no guarantee that evidence complies with the Confrontation Clause. Conversely, noncompliance with hearsay rules does not necessarily amount to a confrontation violation. And this divergence makes sense: Confrontation and hearsay do not track one another because the Confrontation Clause governs *only* the admission of testimonial evidence, while hearsay rules govern the admission of both testimonial and nontestimonial evidence. Unless corrected, the *Hood* opinion will directly contradict the distinction between

confrontation and hearsay that has been enshrined in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny.

In addition, if unmodified, the *Hood* opinion radically alters the burden for criminal defendants who bring a hearsay challenge. Before *Hood*, a trial court's hearsay determination was reviewed only for an abuse of discretion. See, e.g., *State v. Gross*, 97 Ohio St. 3d 121, 2002-Ohio-5524 ¶ 43; *State v. Issa*, 93 Ohio St. 3d 49, 64 (2001). Now, because every evidentiary hearsay violation is also a constitutional confrontation violation, appellate courts will have to undertake de novo review of these evidentiary determinations. See, e.g., *State v. Jones*, 2012-Ohio-5677; *State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742. And that is unquestionably a sea change. Before *Hood*, hearsay violations were often nonconstitutional errors, subject to the familiar harmless error standard. *State v. Webb*, 70 Ohio St. 3d 325, 335, 1994-Ohio-425. But the *Hood* opinion makes *every* hearsay violation a constitutional error, and therefore subject to a much higher standard of review. The State will always have to prove the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). By effecting these changes, without explanation, the *Hood* opinion ushers in a dramatic change in hearsay law in Ohio.

For the reasons explained below, the Court should reconsider its decision and modify the *Hood* opinion as explained in Part D.

DISCUSSION

A. The United States Supreme Court has made clear that violations of the Confrontation Clause and violations of evidentiary hearsay rules are not coextensive.

The Sixth Amendment's confrontation right and the authentication rules for admitting hearsay under the Rules of Evidence are "not coextensive." *State v. Edwards*, 107 Ohio St. 3d 169, 2005-Ohio-6180 ¶ 18. Every piece of evidence is either testimonial or nontestimonial. The

Confrontation Clause applies *only* to testimonial evidence. *Crawford*, 541 U.S. at 68; see also *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2720 n.1 (Sotomayor, J., concurring) ("[T]he purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."). By contrast, the rules of evidence apply both to testimonial and nontestimonial statements.

In light of these dual regimes, the "key issue" in evaluating any confrontation challenge "is what constitutes a testimonial statement." *Hood*, 2012-Ohio-5559 ¶ 30 (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)). If a statement is not testimonial, it does not violate the Confrontation Clause. But states still have great leeway to police the admission of nontestimonial statements through evidentiary hearsay rules. *Crawford*, 541 U.S. at 68 (observing states' great "flexibility in their development of hearsay law" as to nontestimonial statements). Ohio's evidentiary rules generally prohibit hearsay evidence, then authorize several exceptions where hearsay is admissible. For example, business records may be admitted, Evid. R. 803(6), as long as they are properly identified and authenticated at trial, Evid. R. 901.

Until 2004, there was no firm line between hearsay violations and confrontation violations. Under *Ohio v. Roberts*, 448 U.S. 56 (1980), any evidence that satisfied a hearsay rule also satisfied the Confrontation Clause. But *Crawford* overruled *Roberts*, and thus dissolved the partnership between hearsay and the Confrontation Clause. Now evidence may violate the Confrontation Clause even if it is properly admitted under a hearsay exception, *Crawford*, 541 U.S. at 61, and some hearsay evidence (nontestimonial hearsay) does not implicate the Sixth Amendment at all, *id.* at 51.

In sum, just because evidence is admissible hearsay does not mean it satisfies the Confrontation Clause. And just because evidence is inadmissible hearsay does not mean it

violates the Confrontation Clause. Indeed, a confrontation violation occurs *only* if a statement is testimonial and the defendant did not have an opportunity assess the statement's reliability "by testing in the crucible of cross-examination." *Id.* at 61.

B. As written, the *Hood* opinion contravenes binding United States Supreme Court precedent by constitutionalizing every hearsay violation.

Perhaps inadvertently, but nonetheless expressly, *Hood* disregards the United States Supreme Court's clear directive that nontestimonial evidence does not trigger a defendant's confrontation rights, regardless of whether it satisfies other applicable evidentiary rules. A nontestimonial statement does not become testimonial if an evidentiary rule is violated. *Hood* says the opposite, without any explanation.

The key holding of *Hood* is correct: "Because cell-phone records are generally business records that are not prepared for litigation and are thus not testimonial, the Confrontation Clause *does not affect their admissibility.*" *Hood*, 2012-Ohio-5559, ¶ 36 (emphasis added); *id.* at syl. ("Cell-phone records . . . are business records and are not testimonial" (emphasis omitted.); *id.* ¶ 1 ("[O]rdinarily such records . . . are business records and are not testimonial."); *id.* ¶ 33 ("[T]he regularly conducted business activity of cell-phone companies is not the production of evidence for use at trial."). Accordingly, the Sixth Amendment has nothing to say about the admission of cell phone records.

But the *Hood* opinion then incorrectly concludes that a nontestimonial record *becomes* testimonial if its admission violates the rules of evidence. In other words, under *Hood*, a record's nontestimonial status is contingent upon it satisfying the hearsay rules. The opinion reasons that cell-phone records are nontestimonial only "if properly authenticated." *Id.* at syl. ("Cell-phone records, *if properly authenticated*, are business records and are not testimonial" (emphasis altered)); *id.* ¶ 1 ("[O]rdinarily such records, *if properly authenticated*, are business

records and are not testimonial."). If they are not properly authenticated, however, the opinion says "their admission violates a defendant's rights under the Confrontation Clause." *Id.* ¶ 1.

By this logic, the *Hood* opinion concludes that every "hearsay violation . . . violates the Confrontation Clause, and thus requires a heightened harmless-error analysis." *Id.* ¶ 40. In support, the opinion cites several *Roberts*-era cases. *Id.* ¶¶ 40-42 (citing *White v. Illinois*, 502 U.S. 346, 356 (1992); *State v. Johnson*, 71 Ohio St. 3d 332, 339 (1994); *State v. Hirtzinger*, 124 Ohio App. 3d 40, 49-50 (2d Dist. 1997); *State v. Kidder*, 32 Ohio St. 3d 279, 284 (1987)). Because these cases all precede *Crawford*, however, they reflect confrontation jurisprudence that is no longer good law and that the United States Supreme Court has squarely rejected. It is no longer true that "any error in admitting . . . hearsay would be constitutional error." *Johnson*, 71 Ohio St. 3d at 339. Now only an error in admitting *testimonial* hearsay is a constitutional problem; the erroneous admission of *nontestimonial* hearsay is outside the scope of the Confrontation Clause. See Part A.

In short, the *Hood* opinion mistakenly constitutionalizes every hearsay violation. The Court should reconsider that aspect of its opinion and modify it to clarify that non-testimonial evidence is never within the purview of Confrontation Clause, even when its admission violates the rules of evidence. This clarification is essential to ensure that Ohio law is consistent with governing United States Supreme Court precedent.

C. If uncorrected, the *Hood* opinion will significantly lower the bar for defendants presenting hearsay challenges.

In addition to contradicting United States Supreme Court precedent, the *Hood* opinion also significantly lowers the bar for defendants presenting hearsay challenges in all future cases. If all hearsay violations are constitutional, they will be subjected to a much higher standard of review than other evidentiary challenges. *Hood* neither acknowledges nor explains this change.

First, courts would have to review hearsay determinations de novo, rather than for an abuse of discretion. This Court has long reviewed a trial court's evidentiary determinations only for an abuse of discretion. See *Gross*, 2002-Ohio-5524 ¶ 43; *Issa*, 93 Ohio St. 3d at 64. Indeed, Ohio courts have applied this standard of review to the precise evidentiary question at issue in *Hood*—authentication of business records. See, e.g., *State v. Taylor*, 8th Dist. No. 98107, 2012-Ohio-5421 ¶¶ 22-23; *State v. Corder*, 4th Dist. No. 10CA42, 2012-Ohio-1995 ¶¶ 14-15; *State v. Wiley*, 2d Dist. No. 2011-CA-8, 2012-Ohio-512 ¶ 10; *State v. Barton*, 12th Dist. No. CA2005-03-036, 2007-Ohio-1099 ¶ 80. But if *Hood* makes every hearsay violation a confrontation violation, then the abuse of discretion standard can no longer apply. Instead, hearsay challenges will have to be evaluated de novo like any other alleged confrontation violation. See, e.g., *Jones*, 2012-Ohio-5677 (reviewing confrontation challenge de novo); *Arnold*, 2010-Ohio-2742 (same).

Second, if a hearsay error is also a confrontation problem, then the admission of hearsay will always trigger the "heightened harmless-error analysis" reserved for constitutional errors. *Hood*, 2012-Ohio-5559, ¶ 40. Under Ohio law, "[n]onconstitutional error is harmless if there is substantial other evidence to support the guilty verdict." *Webb*, 70 Ohio St. 3d at 335. By contrast, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. If unmodified, the *Hood* opinion means every hearsay violation is a constitutional error, and that the error must be harmless beyond a reasonable doubt. Hood's conviction can withstand even this heightened standard, but that will not be true of every conviction.

These consequences are highly significant to the future of criminal prosecutions in Ohio and *Hood* offers no constitutional basis or other reason for introducing this new regime. The parties did not brief or argue these points, and there is no indication that the Court realized that

its opinion would cause a sea change in Ohio law. Accordingly, the Court should reconsider its opinion and clearly distinguish between hearsay violations and confrontation violations as directed by United States Supreme Court precedent and well-established Ohio law.

D. The Court should adhere to its judgment, but modify its opinion to avoid suggesting that every hearsay violation is also a confrontation violation.

The Court need not modify its judgment sustaining Hood's conviction to correct this analytical misstep. Instead, to avoid running afoul of United States Supreme Court precedent and unnecessarily disrupting Ohio law, the Court only needs to modify the opinion as follows:

- Remove the phrase "if properly authenticated" from the sentence "Cell-phone records, if properly authenticated, are business records and are not testimonial under *Crawford v. Washington.*" *Hood*, 2012-Ohio-5559, at syl. (emphasis omitted).

- Remove the phrase "if properly authenticated" from the sentence "We find that ordinarily such records, if properly authenticated, are business records and are not testimonial." *Id.* ¶ 1.

- Remove the clause "and their admission violates a defendant's rights under the Confrontation Clause" from the sentence, "However, in an instance where cell-phone records are not properly authenticated at trial, they are inadmissible as hearsay, and their admission violates a defendant's rights under the Confrontation Clause." *Id.*

- In ¶ 1, remove the final four words, "beyond a reasonable doubt."

- Remove ¶¶ 40-42.

- In ¶ 43, explain that the authentication error is "harmless if there is substantial other evidence to support [Hood's] guilty verdict," *Webb*, 70 Ohio St. 3d at 335, and remove references to "constitutional error" and error that is "harmless beyond a reasonable doubt."

- In ¶ 50, remove the final four words, "beyond a reasonable doubt."

These modifications will resolve the issues addressed above and ensure that the Court's jurisprudence about the federal Confrontation Clause is consistent with United States Supreme Court standards.

CONCLUSION

For the foregoing reasons, this Court should reconsider its opinion in *Hood*, and modify its reasoning to clarify that not every hearsay violation also violates the Confrontation Clause.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Motion for Reconsideration of Appellee State of Ohio was served by U.S. mail this 12th day of December, 2012 upon the following counsel:

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