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The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him."[1] To "confront" means an "*opportunity* for effective cross-examination."[2] At the very least, this requires trial judges to give defense counsel wide latitude to question accusers, but is freedom to question all that's necessary for a chance at effective cross-examination? Or, do defendants also have a right to *information* necessary for effective cross-examination? If so, can the Confrontation Clause compel the discovery of such information?

Last year in *United States v. Arias* the Eighth Circuit held that the Confrontation Clause can compel discovery to guarantee an opportunity for effective cross-examination.[3] According to Judge Colloton's dissent, the majority's holding created a "stark conflict in the circuits."[4] The dissent, along with the other circuits, thinks that an opportunity for effective cross-examination only means that the trial judge shall not impermissibly limit the scope of questioning.[5] As long as the defense gets the chance to ask questions freely, the right to confrontation is satisfied.

Since *Crawford*, most of the Supreme Court Confrontation Clause jurisprudence has focused on what constitutes a "testimonial" statement,[6] but the Supreme Court has not recently addressed what constitutes an

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[1] U.S. CONST. amend. VI.

[2] Delaware v. Fensterer, 474 U.S. 15, 20 (1985)

[3] 936 F.3d 793, 799 (8th Cir. 2019).

[4] *Id.* at 802 (Colloton, J., dissenting)

[5] *Id.*; *see also* United States v. Fattah, 914 F.3d 112, 179 (3d. Cir. 2019); United States v. Sardinas, 386 F. App'x 927, 940–41 (11th Cir. 2010); United States v. Hargrove, 382 F. App'x 765, 774–75 (10th Cir. 2010); United States v. Vitale, 459 F.3d 190, 196 (2d Cir. 2006); Isaac v. Grider, No. 98-6376, 2000 WL 571959, at *6–7 (6th Cir. 2000); Tapia v. Tansy, 926 F.2d 1554, 1559–60 (10th Cir. 1991).

[6] *See*, *e.g.*, Ohio v. Clark, 576 U.S. 237, 244 (2015) (discussing post-Crawford Confrontation Clause jurisprudence and the annunciation of the "primary purpose" test for determining whether evidence is testimonial).

"opportunity for effective cross-examination." Given the recent Eight Circuit ruling inaugurating a circuit split, clarification from the Supreme Court would be helpful. If the Court were to consider the issue, this article argues that it should follow the *Arias* majority and hold that the Confrontation Clause can compel discovery to guarantee an opportunity for effective cross-examination.

What happened in *Arias*? A jury convicted Arias of three counts of aggravated sexual abuse.[7] K.P., the alleged victim, claimed that Arias sexually assaulted her in a hotel room during the weekend of his sister's wedding.[8] Before trial, the defense filed a motion to compel discovery of K.P's mental health records, but the trial court denied the motion because of the psychotherapist-patient privilege.[9] At trial, K.P. testified that she was diagnosed with PTSD after the alleged assault.[10] Defense counsel objected to this testimony on Confrontation Clause grounds, arguing that without K.P's mental health records, the defendant was denied an opportunity to effectively cross-examine K.P. regarding her PTSD diagnosis.[11] Without the records, Arias was unable to determine whether K.P. had been diagnosed with PTSD or whether the alleged sexual assault caused the diagnosis.[12]

The majority agreed with defense counsel.[13] Once K.P. testified regarding her PTSD diagnosis, "the Confrontation Clause became implicated, because if the PTSD testimony was allowed to be weighed by the jury, the defendant had a constitutionally protected opportunity for effective cross-examination."[14] This reasoning implies that information is a relevant factor for determining whether an opportunity for effective cross-examination has been provided. When a jury hears an accuser's testimony, but defense has been denied information necessary for a chance at effective cross-examination, the Confrontation Clause can compel discovery of that information.

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[7] *Arias*, 936 F.3d at 795.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 796.
[11] *Id.*
[12] *Id.* at 799.
[13] *Id.*
[14] *Id.*

This resulted in *Arias*. On the basis of the Confrontation Clause, the court demanded that K.P. release her medical records for *in camera* review, so that the trial court could determine whether or not she was diagnosed with PTSD as a result of sexual assault.[15] If she was diagnosed, then her testimony was likely harmless.[16] If she was not diagnosed, or another event caused her diagnosis, a new trial may be necessary.[17] Either way, what is striking about *Arias* is the fact that the court ordered the documents be produced on the basis of the Confrontation Clause.

The dissent, however, disagreed with defense counsel.[18] While the Confrontation Clause guarantees an opportunity for effective cross-examination, it does not "compel discovery of information from a third party that might assist the defendant in cross-examining a witness."[19] There are generally two categories of Confrontation Clause cases: those involving the admission of out-of-court statements and those involving restrictions on the scope of cross-examination by law or by a trial judge.[20] Here, neither is relevant because the K.P. testified at trial, so it's not an out-of-court statement, and no law or trial judge restricted the scope of questioning.[21] The defense counsel was free to question K.P. about PTSD, and that is sufficient to satisfy the Confrontation Clause.[22]

But the dissent misses the fact that denying the defense information does limit questioning. A trial judge prohibiting a line of questioning is one way the scope of questioning can be limited, but it is not the only way. Restricting information that could be used for cross-examination also limits the scope of questioning. Justice Brennan put it this way: "A crucial avenue of cross-examination also may be foreclosed by the denial of access to material that would serve as a basis for this examination."[23] Although the defense knew that K.P. had mental health issues, the defense did not learn

[15] *Id.* at 800.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 801 (Colloton, J., dissenting).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Pennsylvania v. Ritchie, 480 U.S. 39, 67 (1987) (Brennan, J., dissenting).

about her PTSD diagnosis until she testified at trial.[24] Without medical records, the defense did not know whether the diagnosis was true and was a result of the alleged assault. While the Defendant was still permitted to question K.P. regarding her PTSD testimony, the defense had little chance at effective cross-examination because it would be hard to know what line of questioning to pursue without the records. And if the medical records showed that K.P was *not* diagnosed with PTSD, or some other event caused her PTSD, then the defendant was denied a crucial opportunity to impeach his accuser regarding key testimony.

This matters because the testimony implies that a medical professional believed K.P.'s claim about the assault, which may make the jury more willing to believe her too. Since the case was essentially one of conflicting testimony — Arias asserting his innocence and K.P alleging his guilt — credibility was crucial for determining the outcome, and the medical records were crucial for determining K.P's credibility. And, because K.P. brought up her PTSD diagnosis, she waived her psychotherapist-patient privilege, so there was no reason left for denying Arias the records. Prohibiting access to the records, then, while allowing the jury to hear K.P's testimony, denied Arias an opportunity for effective cross-examination.

Therefore, the *Arias* majority was correct in holding that the Confrontation Clause can compel discovery in certain cases. To be sure, the holding is limited. The Confrontation Clause does not guarantee a right to pretrial discovery in general.[25] But the clause does guarantee an opportunity for effective cross-examination, and this was a case where such an opportunity depended on access to information. If defendants are denied access to information necessary to have a chance at effectively confronting an accuser's trial testimony, the right to confrontation becomes a mere formality. In *Crawford*, Justice Scalia did much to revive the Confrontation Clause, following the *Arias* majority would revive it even more by ensuring defendants have the information necessary for a chance at effective cross-examination.

Edited by Ben Davisson

[24] Appellant Reply Br. 6.
[25] *Ritchie*, 480 U.S. at 999.