

ORIGINAL

No. 2010-2260

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 93854

STATE OF OHIO,  
Plaintiff-Appellee

v.

JAMES HOOD  
Defendant-Appellant

MOTION FOR RECONSIDERATION

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## BRIEF

### Request for reconsideration:

The State of Ohio respectfully requests this Court reconsider its decision in *State v. James Hood*, Docket No. 2010-2260, Slip Opinion No. 2012-Ohio-5559 because the decision requires that all hearsay evidence be afforded constitutional scrutiny—even if the evidence involved is far removed from the core concerns of the Sixth Amendment’s Confrontation Clause.

### Decision in Hood:

This Court held that non-testimonial statements do not implicate an accused’s rights under the Confrontation Clause. *Id.* at ¶ 36. The Court also held that cellular telephone records are business records that are not prepared for litigation and, therefore, cellular telephone records are not testimonial in nature. Thus, in order to be admitted into evidence, non-testimonial cellular telephone records must be authenticated as required by Evid. R. 803(6). *Id.* The Court concluded that the records used at Hood’s trial were not properly authenticated and, therefore, should have been excluded as hearsay.

However, this Court then inaccurately stated that the hearsay violation, in and of itself, constituted a Confrontation Clause violation. *Id.* at ¶ 40, citing *State v. Johnson* (1994), 71 Ohio St.3d 332, 339, 643 N.E.2d 1098 (“A hearsay violation itself violates the Confrontation Clause \* \* \*.”) This Court pronounced that hearsay violations are errors of constitutional proportions and therefore they must be reviewed on appeal for harmlessness beyond a reasonable doubt. *Id.* at ¶ 40-42 (“We agree that the admission of the cell-phone records was harmless beyond a reasonable doubt.”) This conclusion is erroneous and inconsistent with prior rulings from this and other Ohio courts because not every hearsay violation amounts to a Confrontation issue. Rather, when the record at issue is not testimonial in nature, its admission without proper authentication cannot

implicate the accused's right of confrontation. Instead, if a trial court abuses its discretion by improperly admitting an unauthenticated business record, such error is to be reviewed for harmlessness.

Cellular telephone records are non-testimonial business records:

Cellular telephone business records are not testimonial in nature. Generally speaking, business records are not testimonial. *Crawford v. Washington* (2004), 541 U.S. 36, 56, 124 S.Ct. 1354. (The only exception is "business records" that are specifically prepared for use in criminal prosecution, as these types of records have been found to be testimonial by the United States Supreme Court. See, *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. 305, 129 S.Ct. 2527.) Entirely dissimilar from testimonial records that are prepared for the purpose of litigation, cellular telephone records are actually akin to autopsy reports, 9-1-1 dispatch logs, and ballistic test results which have all been found to be non-testimonial. See, *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 88, *State v. Jaime*, Cuyahoga App. No. 94401, 2010-Ohio-5783, and *State v. Sims*, Cuyahoga App. No. 89261, 2007-Ohio-6821.

As a record that is kept in the ordinary course of providing cellular telephone service, cell phone records derive their intrinsic trustworthiness from the fact that they are meticulously kept by the businesses for the businesses' own purposes, which are wholly unrelated to the State's prosecution of crimes. In other words, cell phone records are presumed reliable because the facts and data that they document are utilized by the company for business interests—and those business interests are presumptively best served through trustworthy and accurate records. Cell phone records are neither created nor maintained in anticipation of litigation. They are comprised of lists of facts, without opinion or interpretation. As such, this Court was correct in its initial conclusion, "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.” *State v. James Hood*, Docket No. 2010-2260, Slip Opinion No. 2012-Ohio-5559, at ¶ 36.

Unauthenticated non-testimonial records do not implicate the Confrontation Clause:

The admission of unauthenticated non-testimonial business records in a criminal trial does not implicate the accused’s constitutional right of confrontation. In this case the Court incorrectly concluded that the failure of proper authentication of Hood’s cellular telephone records violated his rights under the Confrontation Clause. *State v. James Hood*, Docket No. 2010-2260, Slip Opinion No. 2012-Ohio-5559, at ¶ 39-40, (“Since the records were not authenticated pursuant to Evid.R. 803(6), they were inadmissible as hearsay pursuant to Evid.R. 802. A hearsay violation itself violates the Confrontation Clause, and thus requires a heightened harmless-error analysis”.)

Rather, as this Court has previously determined, a defendant’s constitutional right to confrontation is separate and apart from the procedural matter of proper evidentiary authentication. *State v. Edwards*, 107 Ohio St.3d 169, 837 N.E.2d 752, 2005-Ohio-6180, ¶ 18 (“The Rules of Evidence, however, are not coextensive with constitutional requirements.”) Since cellular telephone records are not testimonial, their admission or exclusion at trial is determined only by the rules of evidence. In other words, just because the cell phone records were not properly authenticated at Hood’s trial does not render them testimonial statements subject to cross-examination.

This Court relied on *Johnson* in reaching its conclusion. However the admission of an unauthenticated non-testimonial business record is materially different from the kind of testimonial hearsay statements that were found to violate the defendant’s confrontation rights in

*State v. Johnson* (1994), 71 Ohio St.3d 332, 643 N.E.2d 1098. In that case this Court found the admission of hearsay evidence violated the accused's right of confrontation, but in *Johnson* the evidence presented was in the form of trial testimony from the victim's sister, the victim's friend, and the victim's daughter who each testified about what the victim had said to them. This Court found that the admission of those statements (outside of a hearsay exception) was not harmless beyond a reasonable doubt. *Id.* at 339.

However, unlike the testimonial statements from the witnesses in *Johnson*, unauthenticated non-testimonial business records do not rise to the level of a confrontation violation. Instead, as this Court indicated in its *per curiam* decision in *State v. Davis* (1991), 62 Ohio St.3d 326, 342-343, 581 N.E.2d 1362, the admission of an unauthenticated business record is only reviewed for harmlessness. In *Davis*, the State sought to admit records (booking sheets from an Illinois jail) through the testimony of an Ohio police officer. This Court reasoned that the officer lacked sufficient familiarity with the operation of the business and the circumstances of the records preparation, and that he did not have personal knowledge of the jail's regular course of business. "Therefore, the record was improperly admitted since no proper foundation was laid by a proper custodian or witness sufficiently familiar with the operation of the business." *Id.* at 343. Yet this Court did not apply the constitutional review, harmlessness-beyond-a-reasonable-doubt, as it did in this case. Rather, in *Davis*, the admission of the unauthenticated business record was reviewed for harmless error. *Id.*

The *Davis* analysis is correct. Where a business record is not testimonial, the accused's right to confront is not triggered. Absent a constitutional violation, the standard of review of an evidentiary error cannot be harmlessness-beyond-a-reasonable-doubt. In fact, like this Court did in *Davis*, Ohio appellate courts have reviewed the admission of business records without

authentication under abuse of discretion and harmless error standards. *State v. Moton* (Mar. 18, 1993), Cuyahoga App. No. 62097, 1993 WL 76904, \*5, *State v. Jordan* (June 1, 1989), Cuyahoga App. No. 55450, 1989 WL 59258, \*7-8, *State v. Fraley*, 6<sup>th</sup> App. No. WD-11-045, 2012-Ohio-4994, ¶ 36.

Abuse of discretion (and harmless error) is the correct standard to be employed in this case. When it comes to the admission or exclusion of evidence, trial courts enjoy broad discretion. That discretion is only tempered by the rules of procedure and evidence. *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. An “abuse of discretion” connotes more than an error of law—it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Where an abuse of discretion occurs, the error in judgment may be found harmless by a reviewing court. As to harmless error, Criminal Rule 52(A) dictates “Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Applied herein, even though the trial court abused its discretion by allowing an unauthenticated business record to be admitted, such error was harmless given the weight of the evidence demonstrating Hood’s guilt.

Broader implications of this holding if *Hood* is not reconsidered:

The Confrontation Clause protections apply only to testimonial statements. *State v. Siler*, 116 Ohio St.3d 39, 876 N.E.2d 534, 2007-Ohio-5637, ¶ 21, citing *Crawford v. Washington*, *supra*; see also *State v. Jones*, Supreme Court of Ohio Docket No. 2008-0525, Slip Opinion No. 2012-Ohio-5677, ¶ 159-180. The restrictions on testimonial hearsay evidence that the Confrontation Clause imposes must not be extended to non-testimonial records. Cell phone records are not created or maintained by cell phone service providers for the purpose of the

State's use in criminal trials. The intent of the business in maintaining such records certainly is not prosecution of violations of the criminal laws of the State of Ohio. Consequently, lack of proper authentication of a cell phone record affects the trustworthiness of the record as an accurate business record. Improper authentication of a non-testimonial record does not, however, affront the Confrontation Clause of the Constitution.

If reconsideration is not granted, the decision in *Hood* will result in close constitutional scrutiny of any non-testimonial hearsay evidence—even that evidence that is far removed from the core concerns of the Confrontation Clause. With regard to the use of non-testimonial statements, the United States Supreme Court specified: “Where nontestimonial hearsay is it issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law \*\*\* as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Crawford v. Washington*, supra, 541 U.S. at 51-52. Thus this Court should clarify in *Hood* that where hearsay is non-testimonial in nature, it is merely subject to the admissibility and authentication requirements of state evidentiary rules and is not subject to Confrontation Clause standards of review.

### **CONCLUSION**

The State of Ohio respectfully requests this Honorable Court reconsider its decision to the extent that the Court determined that the admission of unauthenticated business records implicates an accused's constitutional right of confrontation. Instead the State requests this Court clarify that the lack of proper authentication of a record presents only the evidentiary matter of the trustworthiness of the record as an accurate business record. The State requests the

Court make clear that the failure of proper authentication of a non-testimonial business record does not give rise to an error of constitutional proportions. Finally, the State requests this Court adhere to its judgment in all other respects.

Respectfully submitted,

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**SERVICE**

A true and accurate copy of the foregoing Motion for Reconsideration has been sent by regular United States Mail on this 12<sup>th</sup> day of December, 2012, to the following counsel for

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