No.

IN THE SUPREME COURT OF THE UNITED STATES

R Jay Thompson,

Petitioner,

vs.

The State of Oklahoma,

Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

A Sexual Assault Nurse Examiner (a "SANE" nurse) is an employee at a hospital who collects physical evidence, interviews a complaining witness of sexual assault, and prepares a "rape kit" of the forensic evidence collected which is forwarded to law enforcement for prosecution. In this case, the complaining witness died prior to trial. However, the State was allowed to introduce hearsay statements by the complaining witness made to the SANE nurse, over a Confrontation Clause objection of the accused. Whether statements made to the SANE nurse are "testimonial" for Sixth Amendment purposes is a legal question that has divided the lower courts. The question presented is:

1. Are hearsay statements made to a SANE nurse by a witness complaining of sexual assault, who is not available at trial because of death, testimonial in nature and therefore inadmissible under the Sixth Amendment in the absence of in-court confrontation by the accused?

II.

In addition to hearsay statements by the complaining witness made to the SANE nurse, the State was allowed to introduce into evidence statements made to the grandmother of the complaining witness. The lower court found such hearsay non-testimonial, and otherwise admissible under the "excited utterance" exception to the hearsay rule. The question presented is:

2. Are hearsay statements made the grandmother of the witness testimonial under the Sixth Amendment and admissible under the "excited utterance" exception to the hearsay rule when the startling event occurred up to a day prior to the statements?

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TABLE OF AUTHORITIES

R Jay Thompson, an inmate currently incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma, petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences on direct appeal on February 28, 2019, in a published opinion reported as *Thompson v. State*, 2019 OK CR 3, ___ P.3d ____. *See* attached Appendix "A."

JURISDICTION

Petitioner's direct appeal was affirmed on February 28, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to…be confronted with the witnesses against him[.]

United States Constitution, Amendment XIV, provides, in part:

> No state shall…deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged by Information, on February 4, 2015, in Pontotoc County District Court, State of Oklahoma, Case Number CF-2015-37, with Count 1: Kidnapping; Count 2: Forcible Sodomy; Count 3: Rape - First Degree; Count 4: Rape First Degree; Count 5: Assault and Battery; and Count 6: Pattern of Criminal Offenses. All alleged after former conviction of three felonies. After a preliminary hearing, the trial court granted the State's motion to amend Count 5 to Aggravated Assault and Battery. On July 18, 2016, the State filed an Amended Information, amending Count 5. (O.R. 121-122)

A jury trial was held on August 8-11, 2016. At this first trial, the trial court declared a mistrial on August 11, 2016, based on juror misconduct. A retrial was conducted by the Hon. C. Steven Kessinger on May 16-19, 2017. The jury returned verdicts of guilty on all counts, and recommended sentence on Counts 1-2: 20 years imprisonment; Counts 3-6: Life imprisonment each count. On July 10, 2017, the trial court sentenced Petitioner to the jury's recommendation ordering the terms to be served consecutively.

STATEMENT OF THE FACTS

Back in August or September, 2014, Thompson dated a woman named A.T. in an around Ada, Oklahoma. The two of them had met when Thompson saw A.T. walking near a bowling alley and he offered her a ride. Before they parted company, Thompson paid A.T. for sex. From August, 2014, until January, 2015, Petitioner had 25 to 30 dates with A.T.

On January 8, 2015, Thompson called A.T. seeking a date. When he arrived at the house where A.T. lived along with her grandmother, A.T. came out and got into Thompson's vehicle. A.T. went back into the house before coming out again to leave with Petitioner. While driving away, A.T. instructed Thompson to drive to the Sandy Creek area. On the way there, A.T. requested money from Thompson so she could purchase drugs. Thompson refused to give her money.

When they got to Sandy Creek, Petitioner pulled over at A.T.'s request so she could speak with another female about getting drugs. This prompted an argument and fight between A.T. and the female, which was broken up by Thompson by putting his arm around A.T.'s neck and pulling on her hair.

Thompson assisted A.T. into his vehicle and left Sandy Creek, asking A.T. if she knew the girl and had set-up the meeting, when A.T. reached behind Thompson's seat and grabbed his knife. She held the knife near his throat and stated, "I want a line." After Thompson told her to put up the knife, A.T. began hitting herself in the face because she wanted drugs, and was "tripping out." This caused Thompson to stop the vehicle and attempt to block A.T.'s self-abuse, which resulted in A.T. hitting Thompson's hand into her throat.

Thompson then drove to his father's house near Sasakwa. When they arrived, he asked A.T. if she wanted anything to eat or drink. When A.T. indicated she did not, Thompson went into his father's residence and had a quick snack and drink. A.T. laid down in the vehicle while Thompson was inside.

Thompson asked A.T. if she wanted to go to his residence; when she agreed, Thompson took her there and tended to her injuries. A.T. sustained injuries to the left side of her face, a bloody nose and scratches on her neck. When they went into his residence, Thompson noticed that A.T. was not wearing any pants. A.T. said she threw them out the window at which time Thompson advised that he was not going back to look for them. Instead, he provided her with clothes. A.T. spent the night at Thompson's residence and participated in consensual sex the next morning.

During the morning of January 9, 2015, Joe McCorkle, Thompson, and A.T. went into the nearby town of Coalgate. Thompson drove to town and A.T. drove back to Thompson's residence. They dropped McCorkle at his residence and Thompson and A.T. went back to Thompson's residence to sleep.

Later, when Thompson woke, A.T. advised that she had a headache and Thompson called his neighbor, Jose Muniz, to bring some cigarettes and aspirin on his way back from work. After Muniz arrived, A.T. advised that she was ready to go home. McCorkle and Thompson made another trip to town in McCorkle's new car, after which Thompson took A.T. home. She did not allow him to drive her up to her grandmother's house, but, instead, instructed him to drop her at the end of the block. A.T. later went to the hospital, where she was treated for several injuries.

A.T. made a report to law enforcement that resulted in Thompson's arrest for rape, kidnapping, sodomy, aggravated assault, and pattern of criminal offenses. Thompson denied raping, kidnapping, intentionally assaulting, or sodomizing A.T.

On January 15, 2015, A.T. overdosed on methamphetamine, amphetamines, and opiates, which left her in a vegetative state at the time of preliminary hearing in this case; and she died on January 11, 2016, prior to trial. Because of the death of A.T. prior to trial, the State was unable to present her in person to testify against Thompson.

However, the State secured a conviction in this case largely by the ruling of the trial court allowing the State to introduce hearsay statements made by A.T. through two persons: 1) Debra Campbell, the Sexual Assault Nurse Examiner ("SANE Nurse"); and 2) Charlsie Wilson, the grandmother of A.T.

REASONS FOR GRANTING THE WRIT

A. To resolve a conflict among the lower courts whether statements made to a Sexual Assault Nurse Examiner (SANE) are testimonial under the Sixth Amendment, and thus subject to exclusion under the Confrontation Clause absent the right of the accused to confrontation in open court.

The Sixth Amendment applies to the States under the Fourteenth Amendment, and provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *Pointer v. Texas*, 380 U.S. 400, 403 (1965). In *Crawford v. Washington*, 541 U.S. 36, 51 (2004), this Court held that the Confrontation Clause guarantees a defendant's right to confront those "who bear testimony" against him. *Id.* The Sixth Amendment prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness

is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford, supra*, at 68; *see also Davis v. Washington*, 547 U.S. 813 (2006).

In the instant case, A.T. became unavailable because of her death due to a drug overdose and Thompson never had an opportunity to cross examine her. Thompson defended the case on the grounds that A.T.'s allegations were the result of her drug abuse and because he would not give her money for drugs.

The legal dispute here revolves around whether the statements made by A.T. to the SANE nurse, which were relayed by the nurse to the jury in this case, were "testimonial" under the precedents of this Court.

The examination by the SANE nurse is an investigative interrogation resulting in a report being written for the production of evidence by the prosecution at trial and resembling the abuses targeted by the Confrontation Clause when the prosecution uses out-of-court statements to circumvent the literal right of confrontation. The SANE nurse is trained to perform "medical forensic exams" and to collect evidence.

The clothing of the complaining witness is collected, and a protective mat is used when the clothing is removed in order to ensure that any debris is collected; nail swabs are collected; and the evidence collected is provided to law enforcement. In this case, A.T. was treated medically at the ER, and the examination and evidence collected by the SANE nurse did not occur until the next morning.

On direct appeal, the OCCA determined that the statements made by A.T. to the SANE nurse were provided for the *primary purpose* of *medical diagnosis* and

treatment, making the statements admissible under state law (the medical treatment hearsay exception at Okla. Stat. tit. 12 § 2803(4)) and not subject to exclusion under the Sixth Amendment. *See Thompson v. State*, 2019 OK CR 3, ¶16.

The OCCA recognized that the lower courts are divided sharply on this subject.

Many courts have found a victim's statements made to medical personnel, including sexual assault examiners, describing the attack and naming the perpetrator were non-testimonial under the Sixth Amendment because the primary purpose of the exam was for medical treatment. *See, e.g., Ward v. State,* 50 N.E.3d 752, 760-64 (Ind. 2016); *United States v. Chaco,* 801 F.Supp.2d 1200, 1213 (D.N.M. 2011); *State v. Miller,* 264 P.3d 461, 490 (Kan. 2011); *State v. Harper,* 770 N.W.2d 316, 322-23 (Iowa 2009); *People v. Garland,* 777 N.W.2d 732, 737-38 (Mich.App.1 2009); *State v. Slater,* 939 A.2d 1105, 1117-19 (Conn. 2008); *State v. Krasky,* 736 N.W.2d 636, 640-42 (Minn. 2007); *State v. Stahl,* 855 N.E.2d 834, 838-46 (Ohio 2006); *People v. Vigil,* 127 P.3d 916, 921-26 (Colo. 2006); *Commonwealth v. DeOliveira,* 849 N.E.2d 218, 225-26 (Mass. 2006); *Hobgood v. State,* 926 So.2d 847, 852 (Miss. 2006); *State v. Vaught,* 682 N.W.2d 284, 290-93 (Neb. 2004).

In contrast, other courts have found that a victim's statements to a sexual assault examiner *were* testimonial based upon evidence of the examiner's relationship with police or involvement of the police in the exam process, and the absence of any need for, or provision of, medical treatment during the exam. *See, e.g., Hartsfield v. Commonwealth,* 277 S.W.3d 239, 244-45 (Ky. 2009); *People v. Vargas,* 100 Cal.Rptr.3d 578, 588-89 (Cal. Ct. App. 2009); *State v. Romero,* 156 P.3d 694, 698-

99 (N.M. 2007); *State v. Cannon,* 254 S.W.3d 287, 304-06 (Tenn. 2008); *United States v. Gardinier,* 65 M.J. 60, 65-66 (C.A.A.F. 2007); *Medina v. Nevada,* 143 P.3d 471, 476 (Nev. 2006).

In Thompson's case, the OCCA considered this legal issue of first impression under the Sixth Amendment, and sided with those courts holding that hearsay statements to a SANE nurse are non-testimonial in nature, and thus not prohibited under the Sixth Amendment. Thompson disagrees with this view, and asks this Court to grant certiorari in order to resolve the conflict in the lower courts on this constitutional issue.

B. This Court should decide the legal question of whether the Confrontation Clause is violated by the admission of hearsay statements under the exception for excited utterances under Okla. Stat. tit. 12 § 2803(2).

In addition to the hearsay statements introduced by the SANE nurse, the State also introduced hearsay statements made by A.T. through the testimony of Charlsie Wilson, A.T.'s grandmother. As with the SANE nurse, Thompson had no opportunity to confront and cross-examine A.T. regarding the statements she made to her grandmother.

Contrary to the conclusion of the OCCA below, Thompson asserted at trial that these hearsay statements were testimonial in nature, A.T. was unavailable to testify, and Thompson had no opportunity to cross-examine A.T.

Hearsay statements made to Wilson were testimonial in nature.

At trial, the State offered into evidence the testimony of 83-year-old Charlsie Wilson, A.T.'s grandmother with whom A.T. lived. Wilson testified regarding A.T.'s actions the evening of January 8, 2015. Wilson noted that A.T. received a telephone call and went outside the residence. A.T. was wearing jeans, a green t-shirt, and tennis shoes. A.T. then came back into the house and left, again; she did not take her telephone or purse.

A.T. contacted Wilson by telephone late the next morning, on January 9, 2015, and returned home later that day. After entering the house, A.T. locked the door, leaned with her back against the door and slid to the floor. Wilson observed A.T. had a black eye, scrapes and scratches and noted that A.T. did not have those injuries when she left the day before. Wilson stated that A.T. was crying and then would scream.

Over objection, Wilson testified that A.T. stated that Thompson grabbed her in the front of the house, pulled her into his vehicle, and would not let her go. A.T. had went back inside Wilson's home only to voluntarily leave the home again. A.T. stated that Thompson took her to Seminole and raped her and then took her to Coalgate to his residence, tied her up, and raped her twice.

A.T., repeatedly, told Wilson that Thompson said he would kill A.T. if she told what happened. A.T. stated Thompson had a big knife that he held to her throat, made her drink some kind of liquid while at his residence, beat her, and raped her. Wilson allegedly did not know Thompson. But yet it was Thompson who called A.T.'s phone before she had gone outside the first time.

Wilson took A.T. to the Chickasaw Hospital for treatment. A.T. made these statements to Wilson before, and during, the trip to the hospital. A.T. had calmed down by the time they arrived at the hospital. After arriving at the hospital, Wilson approached the desk and asked that the police be called and a rape kit be obtained.

Wilson stated that she did not ask A.T. any questions that night. However, at the preliminary hearing, Wilson did testify that when A.T. called her the morning of January 9, 2015, she did ask A.T. what was wrong which is not reliable testimony because, A.T., who was not crying or hysterical sounding, stated she was at a friend's house. There was no indication from A.T. at that time that she was in distress.

In determining whether admitted hearsay statements violate the Confrontation Clause, a court determines whether the hearsay statements are testimonial in nature. Whether the statement is admissible under an exception to the hearsay rule in Oklahoma law is a separate issue. *Frederick v. State*, 2017 OK CR 12, ¶ 44, 400 P.3d 786, 806.

This Court has articulated the test for whether statements are "testimonial" as follows: "statements that were made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. In addition, testimonial statements are not limited to formal statements made to government officers, but also include pretrial statements that a declarant would reasonably expect to be used prosecutorially." *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 29, 241 P.3d at 227, (citing *Crawford v. Washington*, 541 U.S. at 51)).

This Court has not recognized an "excited utterance" exception to define a hearsay statement as nontestimonial. However, if statements are made in the course of police interrogation, if made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" the statement is nontestimonial. *Davis v. Washington*, 547 U.S. 813, 822 (2006). "Whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Michigan v. Bryant*, 562 U.S. 344, 363 (2011). However, "when the circumstances objectively indicate that there is no such ongoing emergency" the statements made by a domestic abuse victim are testimonial. *Hammon v. Indiana*, 547 U.S. 813, 822 (2006) (primary purpose of interrogation of domestic abuse victim was to establish or prove past events).

The OCCA in *Hunt v. State*, 2009 OK CR 21, 218 P.3d 516, followed the reasoning in *Davis*, and found that a declarant's hearsay statements in a 911 call that related past acts of abuse by the defendant, "would be the same as live testimony" in a prosecution for those acts, and were "inherently testimonial and subject to the confrontation clause." *Hunt v. State*, supra, 218 P.3d at 519.

Like statements made to a 9-1-1 operator, the statements made by A.T. to Wilson were not a result of police interrogation, or even contemporaneous questioning by Wilson. However, Wilson did attempt to question A.T. during the telephone call that morning. To Wilson, A.T. "deliberately recounted ... how potentially criminal past events began and progressed," and the statements "took place sometime after the events described were over." *Hammon v. Indiana*, 547 U.S. 813, 830 (2006).

There was no ongoing emergency situation. A.T. was not fleeing from Thompson - he had dropped her a block from her home, after she requested to go home. Therefore, the ongoing emergency situation defined in *Hammon* was not applicable and would bar admissibility of the hearsay statements.

Further, although the statements were made to her grandmother and not pursuant to police questioning, A.T. could reasonably expect these statements would be used to prosecute Thompson. She repeatedly told Wilson that Thompson said he would kill A.T. if she told anyone what happened - yet A.T. did tell. She told Wilson and Campbell what allegedly happened and later made a statement to Police Chief David Hanson who secured an arrest warrant based on A.T.'s statement.

She did not object when Wilson told personnel at the hospital to call police, she spoke to Chief Hanson when he went to the hospital, she agreed to a sexual assault examination, and requested that the results of that examination be given to police. These are all actions by a declarant who could reasonably expect that statements she made to Wilson would be used in a later prosecution of Thompson, which they were. Thus, the statements of A.T. were testimonial in nature and should not have been admitted.

This Court should grant review in order to determine the important constitutional issue of whether the "excited utterance" exception to the hearsay rule is compatible with the Sixth Amendment if the statement is made too remotely in time to be considered an excited utterance.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari to review the the decision of the Okalhoma Court of Criminal Appeals.

DATED this 24th day of May, 2019.

Respectfully submitted,

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