No. 19-6

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

v.

JAHMARLEY JONES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division, Second Department

REPLY BRIEF FOR PETITIONER

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I. The issue presented by petitioner is reviewable.

Respondent claims that the issue presented for review in this petition is not reviewable because there was a separate and independent state ground for reversal. Respondent is incorrect because the state court never made a "plain statement" (*Michigan v. Long*, 463 U.S. 1032, 1042 [1983]) that it was relying upon an independent state law ground.

"This Court will not review a question of federal law decided by a state court if the decision ... rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040–41. "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

Here, the state court asserted, "[C]ontrary to the People's contention, information derived from the debriefing of arrested S.N.O.W. Gang members constitutes testimonial statements within the meaning of" *Crawford v. Washington*, 541 U.S. 36 (2004). The state court also asserted, "Separate and apart from the *Crawford* errors, Georg's testimony also ran afoul of the proscription against police experts acting as summation witnesses, straying from their proper function of aiding the jury in its fact-finding, and instead instructing the jury on the existence of the facts needed to satisfy the elements of the charged

offense . . . ." (A. 4a-6a, *citing People v. Inoa*, 25 N.Y.3d 466 [2015]). The court concluded by stating, "As a result of the *Crawford* violation *and* the *Inoa* error, a new trial must be ordered because the evidence of the defendant's guilt, without reference to the errors, was far from overwhelming" (A. 6a) (emphasis added).

While respondent contends that the *Inoa* issue constitutes a separate and independent ground for the state court decision, the state court gave no indication that the *Inoa* issue, standing alone, would have led to reversal. Rather, the state court asserted that it was reversing based upon the cumulative effect of both the *Crawford* and *Inoa* issues. Specifically, the state court asserted, "As a result of the *Crawford* violation *and* the *Inoa* error, a new trial must be ordered because the evidence of the defendant's guilt, without reference to the errors, was far from overwhelming" (A. 6a) (emphasis added). In other words, the only "plain statement" from the state court was that the *Inoa* issue was inextricably intertwined with the *Crawford* issue, and that both issues prompted the reversal. But there is no "plain statement" that the *Inoa* issue, standing alone and apart from the alleged *Crawford* error, was of such singular importance that it demanded reversal in and of itself. Thus, given that the state court decision does not indicate "clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds" (*Long*, 463 U.S. at 1041), this Court may review the issues raised by petitioner.

In any event, the state court decision contains clear indications that it was rooted in federal, constitutional law, rather than state law. For example, the state court made a "plain statement" that it was relying upon *Crawford* when it concluded that "information derived from the debriefing of arrested S.N.O.W. Gang members constitutes testimonial statements" (A. 4a). Notably, there was no "plain statement" from the state court that *Crawford* was "being used only for the purpose of guidance," and did

not "compel the result that the court has reached." *Long*, 463 U.S. at 1041. And, importantly, the state court did not state – with a "plain statement" – that it was providing defendant with a broader degree of protection under the Sixth Amendment of the New York State Constitution than is required under *Crawford* and the Sixth Amendment to the Constitution of the United States, such that it could be concluded that the state court decision is beyond this Court's scrutiny. *See Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1044. Since the state court opinion was predicated upon its interpretation of *Crawford*, there exists a pure question of federal law which this Court may review.

A fair reading of the state court opinion permits the conclusion that the *Crawford* ground formed the primary basis for reversal. First, the alleged *Crawford* error was the first issue that the state court reached, indicating that the state court deemed this issue the most pressing ground for reversal. By contrast, the *Inoa* issue was mentioned second, indicating that it was a subsidiary error. Second, the state court devoted the lion's share of its opinion to the *Crawford* ground, rather than the *Inoa* ground. This further demonstrates that the state court assigned greater importance to the alleged *Crawford* error, rather than the alleged *Inoa* error. And, third, the state court asserted that the *Inoa* issue, unlike the *Crawford* issue, was "nonconstitutional" (A. 6a). It is well-settled that non-constitutional errors are less serious, and assessed under a more "forgiving" standard,[1] than constitutional errors. Thus, it is reasonable to conclude that the non-constitutional *Inoa* issue played a lesser

[1] *See Fry v. Pliler*, 551 U.S. 112, 116 (2007) (describing different standards of harmless-error review for constitutional and non-constitutional errors); *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir. 1985) ("Errors of constitutional dimension, such as the due process violation here, are more freely noticed than are less serious, non-constitutional errors") (*citing* 3A C. Wright, Federal Practice and Procedure § 856, at 342 [1982]).

role in the reversal than the constitutional *Crawford* issue.

Further, the portion of the state court decision which relied upon *Inoa* does not constitute a separate and independent state ground for reversal because *Inoa* relies primarily upon federal law. Indeed, in discussing the proper parameters of expert testimony, *Inoa* cites *Crawford*, as well as several federal circuit court decisions. And, in reaching its decision, the state court explicitly cited not just to *Inoa*, but federal law as well (A. 5a-6a).

At best, it is fair to conclude that the *Inoa* issue is "interwoven with the federal law." *Long*, 463 U.S. 1032, 1040–1041. But the portion of the decision which mentions *Inoa* does not possess the clarity needed to conclude that the state court resolved this issue exclusively on state law grounds. Indeed, a "plain statement" to this effect might have demonstrated which body of law – state or federal – was primarily relied upon by the state court in reaching its decision. Without such a "plain statement," however, the reference to *Inoa* in the state court decision does not preclude review by this Court. *See National Tea Co.*, 309 U.S. at 557.

It is well-settled that mixed references to state and federal law in a state court decision do not divest this Court of jurisdiction. Indeed, this Court has often reviewed such cases where there is no "plain statement" that there is a separate and independent state ground for the decision. *See, e.g.*, *Maryland v. Garrison*, 480 U.S. 79, 83–84 (1987); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n. 4 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 n. 3 (1986); *New York v. Class*, 475 U.S. 106, 109-10 (1986); *Long*, 463 U.S. at 1043–44. The same conclusion is warranted by this case.

II. The issue presented by petitioner is worthy of review.

In the original petition, petitioner demonstrated that the issue in this case has engendered disagreement both among the Justices of this Court, and among courts nationwide. That issue is whether statements gathered before the occurrence of a crime, or the identification of a suspect, qualify as testimonial under *Crawford*. This issue extends not just to gang experts and their testimony, but any expert at all who testifies at trial, as well as autopsy reports.[2]

Indeed, the state court decision is one that "implicates an important feature of day-to-day law enforcement practice" across the nation, and will have "direct effects" beyond New York. *See Maryland v. King,* 567 U.S. 1301, 133 S. Ct. 1, 3 (2012). As it stands, the instant decision is the primary New York State appellate court decision holding that statements garnered by the police during "debriefings" are testimonial and, thus, under New York State law, this decision is binding on all trial-level courts.[3] The

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[2] *See, e.g., Hensley v. Roden*, 755 F.3d 724, 733-34 (1st Cir. 2014) (collecting cases illustrating the wide-spread confusion on the question of whether autopsy reports are testimonial or not).

[3] The same state appellate court that reversed the conviction in this case used the instant case as the basis for reversing the convictions of two of Jones' co-defendants (*People v. Campbell*, 174 A.D.3d 916 [2d Dept. 2019], *People v. Cato*, 174 A.D.3d 918 [2d Dept. 2019]), and on the very same grounds. Further, the New York Court of Appeals refused to review the instant case (A. 1a). This means that the instant state court decision is, essentially, black-letter New York law, at least as far as the application of *Crawford* to gang-expert testimony is concerned. *See, e.g.*, *People v. Turner*, 5 N.Y.3d 476, 482 (2005) (*citing Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664). In effect, by reversing three convictions based upon the same misinterpretation of *Crawford*, the state court has thrice underscored and emphasized that its approach to *Crawford* issues is the dispositive metric by which trial judges across New York must assess the scope and

decision only adds to the national confusion regarding the proper application of *Williams*. Moreover, given the authoritative standing of the instant case as far as New York jurisprudence is concerned, as well as the lack of further direction from this Court, or the New York Court of Appeals, on whether a crime, and/or a suspect, are needed before a statement may be deemed testimonial, the decision at the heart of this petition may be used as persuasive authority by other state courts in deciding similar issues.

Moreover, criminal gangs often have a national reach, a reach that is fostered by the use of social media, such as the Facebook accounts in this case by which the gang members communicated. Indeed, "Many experts have theorized that social media applications such as YouTube, Facebook, and Twitter have overtaken television and 'gangster rap' as the most significant sources of gang culture juveniles have today." Finelli, *Slash, Shoot, Kill: Gang Recruitment of Children and the Penalties Gangs Face*, 57 Fam. Ct. Rev. 243, 247 (2019). Additionally, "Most gangs today are constantly posting violent or gang-related videos to YouTube and have their own criminal street gang Facebook pages." *Id*. These social media sources give, for example, a gang "the ability to control many of its local groups and thus develop in regions with no previous gang problems or even neighboring troubles." *Id*. Consequently, disrupting the ability of law enforcement to successfully prosecute criminal gangs in New York, or any state for that matter, will only allow these criminal organizations to strengthen, grow, and extend their influence beyond state lines. Moreover, the prevalence of social media as a means by which gangs organize and communicate will, no doubt, increase the need for gang experts at trial to aid fact finders in understanding the vernacular that gang members use. Thus, it is imperative that this Court decide, once and for all, the proper scope of expert

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propriety of gang expert testimony.

testimony as far as *Crawford* and *Williams* are concerned.

While Justice Thomas, in his concurrence in *Williams*, rejected the notion of a "targeting test," the historical examples he gave, as well as the overall facts of *Williams*, demonstrate that the issue presented by petitioner is not limited to whether law enforcement has a targeted individual in mind when eliciting a statement. In *Williams*, the police were investigating a rape; the crime, in other words, had already occurred once law enforcement sought the help of a laboratory to generate a DNA profile of the culprit. In his concurrence, Justice Thomas stated:

> Historical practice confirms that a declarant could become a "witnes[s]" before the accused's identity was known. As previously noted, the confrontation right was a response to ex parte examinations of witnesses in 16th-century England. Such examinations often occurred after an accused was arrested or bound over for trial, but some examinations occurred while the accused remained "unknown or fugitive." J. Langbein, Prosecuting Crime in the Renaissance 90 (1974) (describing examples, including the deposition of a victim who was swindled out of 20 shillings by a " 'cunning man' "); see also 1 J. Stephen, A History of the Criminal Law of England 217–218 (1883) (describing the sworn examinations of witnesses by coroners, who were charged with investigating suspicious deaths by asking local citizens if they knew "who [was] culpable either of the act or of the force"

Williams v. Illinois, 567 U.S. 50, 115 (2012) (Thomas, J.). Notably, each scenario – the facts of *Williams*,

Justice Thomas' example of the theft of "20 shillings," as well as his example of a coroner's investigation – all bear one thing in common: an investigation into an actual crime that had already been committed.

That was not the case here. The murder of SNOW-Gang member Khalil Bowlin, and the resulting conspiracy to murder his perceived killers, had not yet come to pass at the time Officers Bracero and Georg debriefed members of the SNOW Gang. These debriefings, in other words, targeted no specific individual, and no specific crime. Thus, this case presents not only a scenario where there was no targeted individual at the time the relevant statements were taken, but another scenario entirely unaddressed by this Court in *Williams* or any other case: whether statements taken during routine, preliminary investigations, which are solely geared towards establishing whether there is criminal activity to begin with, are testimonial in nature. Given that face-to-face communication between law enforcement and everyday citizens is one of the main ways in which the police gather intelligence, there can be no serious dispute that this question has a staggering, nationwide reach, and demands this Court's immediate attention.

Four justices in *Williams* dissented, and rejected both the "targeted" suspect test, as well as Justice Thomas' "solemnity" metric for evaluating whether statements are testimonial or not. Indeed, one Justice went so far as to call the *Williams* plurality decision, "[T]o be frank—who knows what." *Williams*, 567 U.S. at 141 (Kagan, J. dissenting). The words of the dissent were prescient, as the divergent opinions expressed in *Williams* have plainly led to confusion regarding the proper application of *Crawford* to a variety of cases from around the country (*see* Petition, pp. 13-16, 18-19).

This confusion was recently recognized by a two-Justice dissent from the denial of a petition for certiorari:

> To be fair, the problem appears to be largely of our creation. This Court's most recent foray in this field, *Williams v. Illinois* . . . . yielded no majority and its various opinions have sown confusion in courts across the country.

Stuart v. Alabama, __ U.S. __, 139 S. Ct. 36 (2018) (Gorsuch, J., and Sotomayor, J.).

The two-Justice dissent ended with a call for this Court to confront the Confrontation-Clause conundrums that *Crawford* and *Williams* have spawned:

> [W]e owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area. *Williams* imposes on courts with crowded dockets the job of trying to distill holdings on two separate and important issues from four competing opinions. The errors here may be manifest, but they are understandable and they affect courts across the country in cases that regularly recur. I would grant review.

Stuart, 139 S. Ct. at 37.

Respondent's response essentially ignores this confusion, and pretends that the law is settled.

Such a choice is, of course, also available to this Court, but, to be both "fair" (*Stuart*, *supra*) and "frank" (*Williams*, 567 U.S. at 141 [Kagan, J.]), this Court should not leave the law in limbo any longer. Every investigation that law enforcement conducts – from those focused on a local street gang, to those focused on

domestic terrorist threats,[4] as well as terrorism on an international scale – will involve statements much like those collected here. On both a state and federal level, the police, prosecutors, defense attorneys and courts are in need of guidance as to where such statements stand under *Crawford*. *See, e.g., Williams*, 567 U.S. at 92 (Breyer, J.) ("Obviously, judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases accordingly.").

[4] According to the Department of Homeland Security, the threat of domestic terrorism now equals the danger posed by international terrorism. See, e.g., Nakashima, Ellen: *DHS: Domestic terrorism, particularly white-supremacist violence, as big a threat as ISIS, al-Qaeda*, The Washington Post, 29 September 2019 (available at https://www.washingtonpost.com/national-security/domestic-terror--particularly-white-supremacist-violence--as-big-a-threat-as-isis-al-qaeda-dhs-says/2019/09/20/dff8aa4e-dbad-11e9-bfb1-849887369476_story.html).

CONCLUSION

The one thing clear at this point is that the road that began with *Crawford* has now forked: one pathway requires a crime and/or a suspect for a statement to be deemed testimonial, the other does not. Which path must the courts of this country take? Or, does the road fork three ways, the third path being that of "solemnity"? Is that the proper path? Only this Court can say. This Court should, thus, grant the instant petition.

Respectfully submitted,

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