No. 21-210

In the

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

MARK D. JENSEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent Mark D. Jensen opposes the State's petition because, he argues, no court other than the Wisconsin Supreme Court "has encountered a case with remotely comparable facts" to those of his case. (Response Br. 7.) Jensen further argues that the Wisconsin Supreme Court "faithfully applied this Court's jurisprudence" to hold that the statements in question were testimonial. (Response Br. 7.) He is wrong on both counts. The State maintains that certiorari review is appropriate so that this Court can address whether and when statements about potential future crimes made during ongoing domestic abuse are considered testimonial.

I. The Wisconsin Supreme Court's Decision in *Jensen I* was based on an overly broad view of the meaning of "testimonial" that failed to consider important factors.

Jensen points out that whether a statement is testimonial depends on the totality of the circumstances. (Response Br. 8.) He then argues that the Wisconsin Supreme Court correctly determined under the totality of the circumstances that Julie's statements were testimonial. But the manner in which the Wisconsin Supreme Court applied its formulation of what constitutes a "testimonial" statement demonstrates why that formulation was overly broad and included Julie's statements when it should not have.

First, as the State noted in its petition, the Wisconsin Supreme Court concluded that, under its formulation of the test, "it does not matter if a crime has already been committed or not." (Pet-App. 76, ¶ 28.) But it does matter. As the State pointed out in its petition, multiple jurisdictions have given weight—and in some cases, great weight—to the fact that a declarant's statements concerned the possibility of a crime being committed in the future. *See, e.g.*, *Bray v. Commonwealth*, 177 S.W.3d 741, 746 (Ky. 2005), *overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010); *Turner v. State*, 641 S.E.2d 527, 531 (Ga. 2007); *Demons v. State*, 595 S.E.2d 76, 80 (Ga. 2004); *United States v. Mayhew*, 380 F. Supp. 2d 961, 971–72 (S.D. Ohio 2005); *see also* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1040–43 (1998). For the Wisconsin Supreme Court to give no weight at all to that fact erroneously eschewed the totality of the circumstances and conflicted with holdings from around the country. A decision from this Court would harmonize that case law and offer courts guidance on how to evaluate a statement that concerns a potential future crime, thus warranting the Court's review. *See* U.S. Sup. Ct. R. 10(b).

Second, the Wisconsin Supreme Court's opinion in *Jensen I* predated critical developments in case law concerning the Confrontation Clause. Jensen suggests that the Wisconsin Supreme Court's opinion in *Jensen III* "updated" its reasoning for holding Julie's statements to be testimonial in *Jensen I*. It did not. Rather, the court's analysis in *Jensen III* centered

on whether *Bryant*[1] and *Clark*[2] ran contrary to *Crawford*[3] and *Davis*[4], the controlling cases at the time *Jensen I* was decided. (Pet-App. 4–7.) Because *Bryant* and *Clark* merely "flesh[ed] out" the "primary purpose" test—rather than contradicting it—the court reasoned, Wisconsin's law-of-the-case doctrine applied. (Pet-App. 7.) That is a wholly different decision than if the court had "updated" its reasoning and concluded that, even under *Bryant* and *Clark*, Julie's statements were testimonial; the court did not arrive at such a conclusion. And, as the State noted in its petition, because the result in *Jensen III* was premised on the law-of-the-case doctrine, this Court may consider the reasoning in *Jensen I*. *See Hathorn v. Lovorn*, 457 U.S. 255, 261–62 (1982).

Third, as the concurring opinion in *Jensen III* noted, *Jensen I* failed to account for the ongoing domestic abuse Julie was facing when she made her statements. (Pet-App. 9.) Jensen alleges that the State waived any argument about the relevance of his ongoing abuse of Julie to this case. (Response Br. 19–20.) It did not. As support for his position, Jensen offers *Wood v. Milyard*, 566 U.S. 463, 474 (2012). But *Wood* is a very different case with very different circumstances from this one. There, the Tenth Circuit *sua sponte* raised a waived statute-of-limitations

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[1] *Michigan v. Bryant*, 562 U.S. 344 (2011).

[2] *Ohio v. Clark*, 576 U.S. 237 (2015).

[3] *Crawford v. Washington*, 541 U.S. 36 (2004).

[4] *Davis v. Washington*, 547 U.S. 813 (2006).

defense to a federal habeas claim and decided the case solely on that basis. *Id.* at 465. This Court reversed, concluding that the Tenth Circuit had abused its discretion in relying on a wholly separate defense that the State of Colorado had expressly disclaimed. *Id.* at 474. Here, however, the State has remained consistent in its position that admission of Julie's statements did not violate the Confrontation Clause. The State continues to advance that position. Naturally, the State's argument has evolved over the course of briefing in the many proceedings underlying this case—sometimes in response to the ongoing, simultaneous development of Confrontation Clause jurisprudence—but the State's overarching claim throughout has been that the admission of Julie's statements did not violate Jensen's right to confrontation.

Contrary to Jensen's arguments, these factors all indicate that the Wisconsin Supreme Court's decision in *Jensen I* was based on an overly broad view of what constitutes a "testimonial" statement. This Court has previously cautioned against such overbroad holdings. Writing for a plurality of the Court in *Williams v. Illinois*, Justice Alito commented:

> "[T]he principal evil at which the Confrontation Clause was directed" the Court concluded in *Crawford*, "was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." "[I]n England, pretrial examinations of suspects

> and witnesses by government officials, 'were sometimes read in court in lieu of live testimony.'" The Court has thus interpreted the Confrontation Clause as prohibiting modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right. *But any further expansion would strain the constitutional text.*

Williams v. Illinois, 567 U.S. 50, 82 (2012) (quoting *Michigan v. Bryant*, 562 U.S. 344, 353 (2011); *Crawford v. Washington*, 541 U.S. 36, 43, 50 (2004)) (emphasis added). The Wisconsin Supreme Court's focus on "whether a 'reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime,'" (Pet-App. 76, ¶ 28 (quoting *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005)), strained the constitutional text of the Confrontation Clause. This Court should grant the State's petition and review that decision.

II. The relevant aspects of this case—statements made by a victim of domestic abuse who fears a crime might be committed—are all too likely to recur.

Jensen further urges this Court to deny the State's petition because, he says, the facts in this case are unlikely to repeat as "most jurisdictions would not conclude that statements like Julie's constitute 'present-sense impressions'" and would therefore exclude the statements on hearsay grounds

regardless of any constitutional implications. (Response Br. 12.) The State disagrees, but even if he is correct, Jensen's argument assumes that a decision from this Court in this case would apply only to an identical factual scenario. The State does not seek so limited a holding. Certainly there are cases where a statement, admissible as a present-sense impression, could concern fears of a future crime. Consider, for example, a situation in which a victim calls police to report that her husband is screaming at her and that she fears he is going to kill her because she has never seen him so angry. A decision from this Court in this case will offer guidance about the testimonial nature of the statements in circumstances such as those.

Moreover, Jensen's position disregards the wide applicability a decision in this case would have with respect to cases involving domestic abuse. The unfortunate reality is that domestic abuse and intimate partner violence—including psychological abuse—are all too common. According to a 2010 study,[5] "[n]early half of women and men in the U.S. have experienced psychological aggression by an intimate partner in their lifetime." Almost one-third of women experience physical violence from an intimate partner in their lifetime. Millions of

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[5] National Center for Injury Prevention and Control, National Centers for Disease Control and Prevention, The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report (2010), 48–58, *available at*: https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

Americans confront domestic abuse and violence every year. If even a fraction of those people discusses their ongoing abuse with someone, there is a tremendous potential that a decision from the Court in this case will offer guidance to courts around the country on how to evaluate those statements for their testimonial nature. This Court should not ignore such an important question.

CONCLUSION

The State respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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