22-5027 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JUSTIN D. BENNETT — PETITIONER
(Your Name)

vs.

ELEVENTH COURT OF APPEALS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JUSTIN D. BENNETT
(Your Name)

FRENCH ROBERTSON UNIT, 12071 FM 3522
(Address)

ABILENE, TEXAS 79601
(City, State, Zip Code)

325-548-9035
(Phone Number)

QUESTION(S) PRESENTED

1. Wheather the due process standard recognized in Jackson v. Virginia, 443 U.S. 307 (1979) constitutionally protects an accused against out-of-court statements in violation of the Confrontation Clause during a sufficiency of evidence review?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- The State of Texas vs. Justin D. Bennett, Trial Court No.7234 42nd District Court, Callahan County, Texas. Judgment entered July 13, 2018.
- Ex Parte Justin D. Bennett, WR-9-, 192-01, Texas Court of Criminal Appeals. Judgment entered September 11, 2019.
- Justin D. Bennett vs. The State of Texas No.11-19-00310-CR, Eleventh Court of Appeals of Texas. Judgment entered September 23, 2021.
- Justin D. Bennett vs. The State of Texas PD-0814-21, Texas Court of Criminal Appeals. Judgment entered December 8, 2021.
- Justin D. Bennett vs. The State of Texas Motion for Rehearing Tr.Ct No.7234, 11-19-00310-CR, PD-0814-21, Texas Court of Criminal Appeals. Judgment entered January 26, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the Texas Court of Appeals court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was 12-8-2021. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: 1-26-2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fourteenth Amendment Due Process Clause: The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

United States Constitution Sixth Amendment Confrontation Clause: The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A Callahan County grand jury indicted petitioner for the offense of murder. The indictment alleged that petitioner intentionally and knowingly caused the death of Meagan Dearman by strangling her with his hands, arms, a rope or string on or about January 18, 2017. See TEX. PENAL CODE § 19.02(b)(2)(West 2019).

Trial testimony showed that petitioner and Dearman had a troubled dating relationship prior to the day Dearman went missing on January 17, 2017. (4 RR 185) After friends and relatives had not heard from her several days after January 17, 2017, they contacted Abilene police who issued a missing person's report. (2 RR 104-108, 119-120) On January 27, 2017, Dearman's body was found near T&P Lake in Callahan County outside Baird, she had been strangled and a ligature was still bound tightly around her neck. (2 RR 27) Authorities soon focused their attention on petitioner and he was subsequently arrested at a home in Merkel. (2 RR 51, 84).

At trial, John Ford, an inmate awaiting transport to prison on unrelated charges, testified that he lived in Abilene with his brother Robert when Dearman went missing. Petitioner, he said came to see him at a house on Graham Street in Abilene where his brother lived and that Bennett was driving Herod's white Buick Rendezvous and that petitioner told him that he needed to burn something. (2 RR 14).

Abilene Police Detective John Merrick testified that he

found burned clothes in the backyard of a house at 918 Graham Street in Abilene and that the clothes were sent for testing in Fort Worth. (2 RR 94-96) Diane Arndt, a foresic special agent with the Abilene Police Department testified that she found blood (later linked to the victim) in Jennifer Herod's white Buick Rendezvous on the back driver side seat as well as in the back-hatch luggage area. (2 RR 118-128) Arndt, also testified about the other evidentiary items gathered during the investigation agreeing with defense counsel that petitioner's shoes that was found and collected did not appear to have been "tramping around in wet mud" near the T&P Lake where Dearman's body was discovered and that she could not identify any tire tread marks found near Dearman's body as matching those of Herod's car tires. (3 RR 150, 156).

Wendell Cosenza, a special agent with the FBI, testified that he took a look at all the cell phone records to determine the general locations of petitioner's, Herod's and Dearman's cell phones and he stated that Dearman's cell phone never left the Abilene area from January 17 to January 26, 2017. (4 RR 38, 51, 54-55) He also testified that Herod's and petitioner's cell phones was used in a general area but that he could not put any cell phone at a specific location at a specific time. (4 RR 61-68).

Paul Martinez, an Abilene Police Detective testified that during the search for Dearman, police focused on Jennifer Herod as an accomplice and upon searching her vehicle discovered the

presence of Dearman's DNA. (4 RR 87). The Police Department employed a digital expert to hack the cellphone of petitioner to retrieve petitioner's text message history which revealed a troubled relationship between petitioner and Dearman. Petitioner was breaking up with Dearman and replacing her with Herod. (4 RR 185). Finally, without objection from defense counsel, Detective Martinez provided the State's theory of how Dearman met her fate by testifying that Herod had given a statement on how Dearman met her death at the hands of petitioner. Detective Martinez narrated Herod's entire statement and also opined that Herod was at least an accomplice to Dearman's murder if not an active participant. (4 RR 121). Detective Martinez admitted that neither petitioner or Herod's DNA was found on Dearman's body.

Jennifer Herod did not testify at petitioner's trial and was not therefore subject to cross-examination concerning the the statement's to Detective Martinez which inculpated petitioner in the murder of Dearman.

Heather Kramer, a forensic biologist with the Tarrant County Medical Examiner's Office testified that she conducted DNA tests on various items submitted by the Abilene Police Department and her findings yielded no links to petitioner or Herod. (5 RR 11-28).

The jury returned a guilty verdict against petitioner. The jury assessed punishment, and the trial court sentenced petitioner to seventy years' confinement in the Institutional Division of the Texas Department of Criminal Justice with a $10,000 fine. (6 RR 36).

Petitioner contends that the Eleventh Court of Appeals misapplied the sufficiency of evidence standard of review set forth in Jackson v. Virginia, 443 U.S. 307 (1979) by the inclusion of a non testifying accomplice witness out-of-court statements used at trial in it's analysis.

In doing so, the Court erroneously concluded that uncorroborated accomplice witness testimony can be sufficient to support petitioner's conviction for murder, based on it's use of the criteria to consider all evidence, even improperly admitted evidence when conducting a sufficiency review. The Court's decision is in conflict with established Federal and State law requirements set forth by the United States Constitution Sixth Amendment Clause and the Texas Code of Criminal Procedure Annotated Article 38.14.

The Eleventh Court of Appeals assumed that the fact finders were able to find the essential elements of the offense beyond a reasonable doubt based on Jennifer Herod's out-of-court statements to Detective Martinez who introduced the statements in violation of the Sixth Amendment Confrontation Clause and hearsay rules. (4 RR 121-125, 138-139)(See Exhibit A pp. 9).

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right ...to be confronted with the witnesses against him." U.S. Const. Amend VI. The Confrontation Clause bars admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 541 UU.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed 2d 177 (2004). The Supreme Court

has defined "testimony" as "[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact." Id. at 51 (alteration in original)(citation omitted). But "the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of a matter asserted." Williams v. Illinois, 567 U.S. 50, 132 S.Ct. 2221, 2235, 183 L. Ed 2d 89 (quoting Crawford, 541 U.S. at 59-60 n.9). "Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant. When the statement from an out-of-court witness is offered for its truth, constitutional error can arise." Taylor v. Cain, 545 F.3d 327, 335 (5th Cir. 2008).

The Court did not consider in it's analysis wheather the introduction of Herod's out-of-court statements made to Detective Martinez violated petitioner's Sixth Amendment rights to the Confrontation Clause and wheather the standard of review set forth in Jackson v. Virginia would apply to improperly admitted evidence that violated a defendant's constitutional rights. (See Exhibit A pp. 9). The Court's acknowledgement of Herod's accomplice witness status and the standard of review accordingly to Jackson v. Virginia.

Petitioner contends that the Eleventh Court of Appeals failed to examine three issues concerning the admission of the accomplice witness out-of-court statement, first, whether the questioning, combined with Detective Martinez testimony, intro duced a testimonial statement, second, whether the statement was

offered for its truth, i.e., to show petitioner's guilt; and third, whether Herod was unavailable to testify and petitioner had a prior opportunity to cross-examine her.

Petitioner contends that the Eleventh Court of Appeals did not include in it's analysis whether the court admitted the testimonial statement of a witness who did not appear at trial. Crawford, 541 U.S. at 53-54. "[A] statement is testimonial if its primary purpose...is to establish or prove past events potentially relevant to later prosecution." Duron-Caldera, 737 F.3d at 992-93 (quoting Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L. Ed 2d 224 (2006)).Herod's statements made to Detective Martinez while under interrogation by law enforcement are unquestionally testimonial hearsay. See Crawford, 541 U.S. at 53 (classifying "interrogations by law enforcement" as testimonial hearsay). In Crawford, the Court explained that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." Crawford, 541 U.S. at 52; see also Taylor, 545 F.3d at 335-36. The ?Court reinforced this view in Davis where it stated that "[t]he product of [police] interrogation, whether reduced to a writing signed by the declarant or embedded in the memory...of the interrogating officer, is testimonial." 547 U.S. at 826.

This Court has recognized that police testimony about the content of statements given to them by witnesses are testimonial under Crawford; officers cannot refer to the substance of state-

ments made by a nontestifying witness when they inculpate the defendant. See Taylor, 545 F.3d at 335; Favre v. Henderson, 464 F.2d 359, 362 (5th Cir. 1972). Where an officer's testimony leads "to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged," Confrontation Clause protections are triggered. Favre, 464 F.2d at 364. In Favre, this Court reasoned that "[a]lthough the officer never testified to the exact statements made to him by the informers, the nature of the statements...was readily inferred." Id. at 362. Officer testimony regarding statements made by witnesses is thus inadmissible where it allows a jury to reasonably infer the defendant's guilt. Similarly, a prosecutor's questioning may introduce a testimonial statement by a nontestifying witness, thus implicating the Confrontation Clause. See United States v. Johnston, 127 F.3d 380, 393-95, (5th Cir. 1997); Favre, 464 F.2d at 364; c.f. Gochicoa v. Johnson, 118 F.3d 440, 445-46 (5th Cir. 1997), cert denied, 522 U.S. 1121, 118 S.Ct. 1063, 140 L. Ed. 2d 124 (1988). This is true where "the jury would reasonably infer that information obtained in an out-of-court conversation between a testifying police officer and an informant... implicated a defendant in narcotics activity." Johnston, 127 F.3d at 395.

Here, Detective Martinez testimony introduced Herod's out-of-court testimonial statements by implication. At trial Detective Martinez was asked specific questions and the content of

this testimony implicitly revealed Herod's statements. See Taylor, 545 F.3d at 336. Officer testimony that allows a fact-finder to infer the statements made to him-even without revealing the content of those statements-is hearsay if "offered to establish identification, guilt, or both. " Favre, 464 F.2d at 362. The questions explicitly identified petitioner by name, linking him to the substance of Herod's interrogation. In fact, the questions appeared designed to elicit hearsay testimony without directly introducing Herod's statements. Herod's statements were testimonial because they were made under interrogation, and the primary purpose of that interrogation was to establish "past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822. Herod identified petitioner as the person who murdered Dearman. Although Detective Martinez did not introduce the exact statements made by Herod, the nature was readily inferred.

In this case, Detective Martinez testimony conveyed critical substance about Herod's statement, inculpating petitioner by name and implicating that petitioner's guilt in the crime charged. The content of Herod's statements could be readily inferred from the questions and Detective Martinez's testimony. Detective Martinez's testimony revealed the substance of Herod's statements inculpating petitioner, leading to the clear and logical inference that Herod believed and said that petitioner had murdered Dearman. Detective Martinez introduced testimonial statement for purposes of the Confrontational Clause.

The Eleventh Court of Appeals analysis failed to consider whether Herod's statements introduced at trial through Detective Martinez's testimony were offered for their truth: to prove petitioner's guilt in the crime charged. The Confrontation Clause does not apply to out-of-court statements offered into evidence for a purpose other than establishing the truth of the matter asserted. See Williams, 132 S.Ct. at 2235; Crawford, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed 2d 425 (1985)); Taylor, 545 F.3d at 335.

The substance of Detective Martinez's testimony was that Herod was a suspect in the murder of Dearman. He opined that Herod was at least an accomplice to Dearman's murder, if not an active participant. (4 RR 121). In fact, according to what Herod allegedly told Martinez was that she was present when petitioner killed Dearman in the back seat of her car while they were driving to Callahan County.

Petitioner contends that Herod's statements were offered to show petitioner's guilt. Petitioner also contends that a reasonable jury could only have understood Detective Martinez's testimony to communicate that Herod identified petitioner as Dearman's killer.

Testifying officers may provide context for their investigation or explain "background" facts. See United States v. Smith, 822 F.3d 755, 761 (5th Cir. 2016). Such out-of-court statements are not offered for the truth of the matter asserted therein,

but instead for another purpose: to explain the officer's actions. See Castro-Fonseca, 423 Fed. Appx. 351, 2011 WL 1549213, at *2; United States v. Carillo, 20 F.3d 617, 619 (5th Cir. 1994). These statements often provide necessary context where a defendant challenges the adequacy of an investigation. But absent such claims, there is a questionable need for presenting out-of-court statements because the additional context is often unnecessary, and such statements can be highly prejudicial. See 2 McCormick on Evidence § 249 (7th ed. 2013)(citation omitted) ("The need for this evidence is slight, and the likelihood of misuse is great.") Statements exceeding the limited need to explain an officer's action can violate the Sixth Amendment-where a non testifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay. See Taylor, 545 F.3d at 335; Johnston, 127 F.3d at 394 ("The more directly an out-of-court statement implicates the defendant, the greater the danger of prejudice."); United States v. Evans, 950 F.2d 187, 191 (5th Cir. 1991); United States v. Hernandez, 750 F.2d 1256, 1257 (5th Cir. 1985); United States v. Gomez, 529 F.2d 412, 416-17 (5th Cir. 1976); see also United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004). Questions by prosecutors can also trigger Confrontation Clause violations. See Johnston, 127 F.3d at 402-03; Favre, 464 F.2d at 362-64; Meises 645 F.3d at 21-23. A prosecutor may violate the Confrontation Clause by introducing an out-of-court statement, even indirectly, if offered for its truth by suggest-

ing a defendant's guilt. See Johnston, 127 F.3d at 394-95. In Hernandez, 750 F.2d at 1257-58.

In this case, the questions posed to Detective Martinez and Detective Martinez subsequent testimony exceeded the scope required to explain Detective Martinez actions. Detective Martinez testimony left the jury with the impression that Herod's statements were instrumental in obtaining a murder warrant for petitioner. While Detective Martinez no doubt observed this interrogation, his observations cannot serve as a justification to circumvent constitutional protections; testimony introducing out-of-court statements by a nontestifying witness can result in a violation of the Confrontation Clause. Admitting testimony regarding Herod's interrogation was not necessary to explain Detective Martinez's actions; there was minimal need for Detective Martinez to explain the details forming the basis of the warrant. Detective Martinez could have merely explained that he obtained a warrant to apprehend petitioner following Herod's car search. Detective Martinez's testimony was not limited to merely explaining his actions; it showed that Herod was in the vehicle with petitioner and Dearman and that petitioner had killed Dearman. Testimony regarding questions posed to Herod was not necessary. Other circumstantial evidence and Detective Martinez's observations would have been sufficient to explain his investigatory actions and provide background information. Thus, Herod's out-of-court statements inculpating petitioner were introduced for their truth-

to show petitioner's guilt in the crime charged.

Even if a testimonial statement is admitted against a defendant at a criminal trial, the Sixth Amendment is not violated if both the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. Crawford, 541 U.S. at 53-54. Petitioner did not have the opportunity to cross-examine Herod. Herod's statements were admitted at trial and petitioner questions Herod's credibility as a witness. Petitioner, further contends that it should be incumbent on the defense to produce witnesses for the State; to suggest otherwise misunderstands the burden of proof in a criminal case.

The fact that a defendant could call a witness cannot fairly constitute a prior opportunity to cross-examine that witness. Otherwise, a prosecutor could introduce hearsay statements by any available witness merely proposing that the defense could call them instead. Even if petitioner had a prior opportunity to examine Herod, Herod was not unavailable as defined by the Texas Rules of Evidence. See Texas Rules of Evidence 804(a) (listing criteria for being unavailable as a witness). The State did not offer any reason why it did not elect to call Herod as a witness. Finally, a police officer's testimony is no substitutee for a nontestifying declarant and does not cure a Sixth Amendment violation. See Davis, 547 U.S. at 826; Ocampo, 649 F.3d at 1113. Petitioner contends that the State violated his Sixth Amendment right to confront adverse witnesses at trial was violated by Detective Martinez's testimony

that implicitly introduced Herod's out-of-court statements.

Petitioner contends that the error in admitting Herod's statements in violation of the Confrontation Clause and hearsay rules was not harmless. Petitioner argues that Herod was an accomplice witness who did not testify at trial, thus petitioner was not permitted to cross-examine Herod about her out-of-court statements, which were critical to the State's case. Petitioner similarly questions the reliability of Herod's status as a witness. Petitioner also argues that no other witness in this case could provide testimony from personal knowledge placing petitioner at the scene of the crime or as the person who killed Dearman.

Confrontation Clause violations and errors in the admission of hearsay evidence are subject to review for harmless error. Polidore, 690 F.3d at 710; United States v. El-Mezain, 664 F.3d 467, 494 (5th Cir. 2011).

Petitioner asks this Court, whether the due process standard recognized in Jackson v. Virginia, 443 U.S. 307 (1979) constitutionally protects an accused against out-of-court statements in violation of the Confrontation Clause and hearsay rules during a sufficiency of the evidence review.

Jackson v. Virginia, addresses a challenge to the sufficiency of evidence by a reviewing court to review the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements

of the offense beyond a reasonable doubt.

Petitioner asks this Court to find that Herod's out-of-court statements introduced by Detective Martinez were in violation of the Sixth Amendment Confrontation Clause and hearsay rules. Petitioner also asks this Court to determine the correct standard of review for the Court to apply, to this case.

REASONS FOR GRANTING THE PETITION

Petitioner urges this Court to grant review on his constitutional claims based squarely upon the sufficiency of the evidence under the standard of review set forth in Jackson v. Virginia, 443 U.S. 307 (1979) and the Confrontation Clause analysis set forth in Crawford v. Washington, 541 U.S. 36 (2004), in that the Eleventh Court of Appeals and the Texas Court of Criminal Appeals were in error in not recognizing that the questions to be decided in this case is whether the introduction of Herod's out-of-court statements through the questioning of Detective Martinez admitted testimonial hearsay in violation of the Confrontation Clause and whther any rational fact finder could have concluded beyond a reasonable doubt that the killing for which petitioner was convicted of was based upon sufficient evidence absent the uncorroborated testimony of the accomplice witness Herod who did not testify in petitioner's trial who's testimony was introduced in violation of the Sixth Amendment Confrontation Clause and hearsay rules and whether the constitutional violation could be considered to assist the fact finder during a sufficiency of the evidence challenge or what standard to apply to the review.

Petitioner urges this Court to grant review based on this conflict between the misapplication of the Eleventh Court of Appeals sufficiency of the evidence standard in Jackson v. Virginia and it's decision which strays from the original meaning of the whether there was sufficient evidence to justify a rational

trier of the facts to find guilt beyond a reasonable doubt and Petitioner's Sixth Amendment Confrontation Clause right to be confronted with the witnesses against him, under Crawford v. Washington.

CONCLUSION

Fore the foregoing reasons, Petitioner requests the Court to find the Court admitted testimonial hearsay in violation of the Confrontation Clause and that the Eleventh Court of Appeals misapplied the Jackson v. Virginia, standard of review to petitioner's case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Justin Bennett

Date: 6-8-22