No. 22-511

In The
Supreme Court of the United States

THOMAS MICHAEL DIXON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

GOLDSTEIN & ORR

GERALD H. GOLDSTEIN*
CYNTHIA H. ORR
JOHN GILMORE
AARON M. DIAZ
CARIN GROH
310 S. St. Mary's Street
29th Floor – Tower Life Building
San Antonio, Texas 78205
210-226-1463
gerrygoldsteinlaw@gmail.com

**Counsel of Record*

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Petitioner, Thomas Dixon (Dixon), submits this reply brief pursuant to Supreme Court Rule 15 to respond to several arguments presented for the first time, and to correct certain factual misstatements in Respondent's Brief.

RESPONSE

I. With respect to whether Crawford should be a one-way street, allowing the prosecution to present unconfronted hearsay statements over specific and timely objection, while at the same time preventing the defense from offering repeated recantations, including sworn courtroom testimony and video statements by that same declarant to rebut the prosecution's unconfronted hearsay.

PRESERVATION OF ERROR

In their Brief, Respondents claim that "Petitioner did not object to Detective Zach Johnson's testimony on confrontation grounds." Brief in Opposition 12 (hereinafter referred to as Br.).[1] Respondents also contend that "Petitioner failed to preserve his confrontation objection to each of Shepard's statements

[1] Respondents repeat that claim, arguing that Petitioner "failed to object to [Detective Zach] Johnson's testimony on federal constitutional grounds at trial." Br. 15.

admitted through [Paul] Reynolds." Br. 13. Nothing could be further from the truth.

Contrary to Respondent's claims, Defense counsel repeatedly objected to Shepard's unconfronted hearsay statements admitted through either Paul Reynolds or Detective Johnson specifically and expressly on confrontation grounds.

Prior to trial, defense counsel filed written confrontation objections to both witnesses Detective Johnson and Paul Reynolds testimony.

> [DEFENSE COUNSEL] [U]nder Crawford versus Washington . . . I will remind the Court that we objected *by written objection pretrial* to *any* testimony by *any* witness concerning statements that David Shepard made out of court.

17RR20:1-9 (emphasis supplied).

When the defense moved for a directed verdict at the close of the state's case-in-chief defense counsel renewed their confrontation objection to Detective Johnson relaying Shepard's unconfronted statements to Paul Reynolds, noting that "Zach Johnson's double hearsay about what Paul Reynolds said to him . . . we believe that those statements were admitted conditionally, upon David Shepard being called by the State,[2] so that the Defense would have their right of confrontation." 17RR17:14-25.

---

[2] After all, David Shepard was on the state's witness list, and testified at the first trial, resulting in a hung jury. The same judge

Again, at the close of all evidence defense counsel renewed their confrontation objection, seeking to strike both Reynolds' and Johnson's testimony regarding Shepard's unconfronted statements, reminding the trial court that these objections had been raised by written motion prior to trial.[3]

> [DEFENSE COUNSEL]: Then the last thing I have, your Honor, is now that the evidence has been closed from both sides, and *David Shepard has not been called as a witness, nor has he been made unavailable*, the statements made by [Detective] Zach Johnson to the jury that were *objected to pretrial by written motion for the reasons of hearsay and confrontation clause* . . . should be stricken from the record, and we request that the jury be instructed to disregard any out-of-court statements *relayed by Zach Johnson or Paul Reynolds where the declarant was David Shepard, since he has not testified*.
>
> [THE COURT]: That will be denied.

21RR47-48.

When the prosecution advised they were bringing Paul Reynolds to testify, defense counsel objected, noting:

---

told the same prosecutors that "if the state doesn't call Shepard there's a big problem." 3SCR, Vol. 1, 1365. Accordingly, the court and the parties were well advised as to the confrontation "problem" this scenario would create.

[3] The record reflects that the state had no quarrel with defense counsel's representation.

> [DEFENSE COUNSEL]: In addition, . . . we haven't had the right to confront David Shepard in this trial. So until David Shepard testifies and we have the right to confront him it would be a violation of the confrontation clause to allow Paul Reynolds to relay what David Shepard told him.

8RR18:23-25; 19:1-3.

Again, prior to Reynolds taking the stand, defense counsel renewed his objection and requested a "running objection" to any testimony regarding Shepard's unconfronted hearsay statements to him and the trial court gave it to him.

> [DEFENSE COUNSEL:] Just real quick, your honor, if we could just renew our *objections that we made prior to Mr. Reynolds taking the stand* and ask for a running objection.
>
> THE COURT: It will be noted and the Court will give you a running objection."

8RR64:6-14 (emphasis supplied).

When the state offered the video interview with Detective Johnson relating to unconfronted out-of-court statements attributed to Shepard, State's Exhibit 728, the defense again objected on confrontation grounds.

> [PROSECUTOR]: Your Honor, we would offer State's 728 (sic), which is a copy of that interview.

> [DEFENSE COUNSEL]: Your Honor, we object . . . *it violates our right of confrontation*.

9RR20:1-6 (emphasis supplied).

When the State offered Facebook messages containing out-of-court unconfronted statements attributed to Shepard, defense counsel again objected, stating "we would just reurge our hearsay and confrontation clause objections," to which the trial court stated that the "Court will overrule the objection." 12RR128:8-20 (emphasis supplied).

Again, with respect to Facebook records with unconfronted out-of-court statements attributable to Shepard defense counsel objected on confrontation grounds "until he testifies."

> [DEFENSE COUNSEL]: So they got these records from Facebook. There's a couple of comments by David Shepard in here. And our only objection to those would be *until he testifies* we think those are hearsay and *they violate our right of confrontation.*

13RR74:3-25 (emphasis supplied).

Just to be certain that the trial court understood the difference between their hearsay and confrontation objections, defense counsel added "what David Shepard says out of court on Facebook . . . *violates our right of confrontation.* We just want to make those objections now," to which the trial court responded:

> THE COURT: The Court will overrule your objection as to hearsay about Shepard – so other than that any other objection?
>
> [DEFENSE COUNSEL]: The confrontation clause.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Overruled also?
>
> THE COURT: Overruled.

13RR76:1-3 (emphasis supplied).

With respect to text messages containing out-of-court hearsay statements attributed to Shepard, defense counsel reiterated his "confrontation clause" objection, to which the trial court responded "understood." 14RR127:1-8.

Defense counsel objected to every witness questioned about Shepard's unconfronted hearsay statements to them. For example, when the prosecutor began to question state's witness Sheena Teague,

> [DEFENSE COUNSEL]: Your Honor, just so we don't waive anything, we object to any hearsay and our right to confrontation.
>
> THE COURT: It will be noted and *the Court will give you a running objection*.

15RR23:17-21 (emphasis supplied).

During a bench conference while the prosecutor was examining police officer Trent McNeme, defense counsel observed that "just so we don't waive anything,

we're getting the idea that maybe the State is not going to call David Shepard, and now we have all these out of court statements that have been put before the jury, and I think he's about to go into some more . . . we object . . . it violates our right to confrontation," to which the trial court responded "that will be overruled, and *I'll give you a running objection*, how is that?" 15RR36:1-13 (emphasis supplied).

After the state rested their case, defense counsel reiterated his confrontation objection, noting that "the only evidence" of Petitioner's guilt was "the testimony of Paul Reynolds, recounting a hearsay statement of David Shepard" or "Zach Johnson's testimony regarding what David Shepard said." 17RR17:17.

> [DEFENSE COUNSEL]: [W]e respectfully remind the Court that we believe that those statements were admitted *conditionally*, upon Shepard being called by the state, so that the Defense would have their *right of confrontation.* We have not been allowed to have our *right of confrontation to David Shepard*.

17RR18:13-19 (emphasis supplied).

Defense counsel went on to move that the trial court strike the testimony of both Reynolds and Johnson since Shepard was not called as a witness. 17RR19:15-18.

Again, defense counsel reminded the trial court of the written pretrial confrontation objection to the testimony of *any* witness to *any* out-of-court statements by David Shepard, citing *Crawford v. Washington* for

the proposition that these unconfronted hearsay statements from a witness the state refused to call and subject to cross examination violates the Confrontation Clause, despite the fact that Shepard was under the control and in the custody of the state and included on the State's witness list, they refused to call him.[4]

> [DEFENSE COUNSEL] [U]nder Crawford versus Washington, that's why it's a problem that *it violates our right of confrontation* since Shepard has not been called and *doesn't appear that he will be called* . . . I will remind the Court that we objected *by written objection pretrial* to any testimony by any witness concerning statements that David Shepard made out of court.

17RR20:1-9 (emphasis supplied).

It is hard to imagine more diligent efforts to preserve a defendant's 6th Amendment right to confrontation than those by defense counsel in this case. From beginning to end, defense counsel repeatedly objected to both Reynold's and Johnson's testimony as to

---

[4] At the time of trial, Shepard was in State custody and available to the state. It is obvious why the prosecution didn't call Shepard to testify given his exculpatory testimony at the first trial, and the video recorded recantation just before this trial. And contrary to the Respondent's suggestion, the defense has no obligation to call the State's witness simply to provide the prosecution an opportunity to utilize his prior inconsistent statement to impeach him. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 2540, 174 L.Ed.2d 314, 330 (2009), "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, *not on the defendant* to bring those adverse witnesses into court. *Id*. at 324 (emphasis supplied).

Shepard's alleged unconfronted hearsay statements and the trial court continually assured defense counsel that they were given a "running objection," without any protest from the prosecution. The trial court and the prosecutors were made fully aware of counsel's objections and the trial court was given repeated opportunities to rectify the error. It is disingenuous for Respondent to claim that Petitioner failed to object, waived, or failed to preserve their objection.[5]

SHEPARD'S STATEMENTS WERE "TESTIMONIAL"

Contrary to Respondent's assertions in their Brief at pp. 12-14, Reynold's statements about what he alleged Shepard had told him were "testimonial."

Regardless of Reynolds and Shepard's prior relationship, by the time Reynolds relayed Shepard's supposed "confession" to Detective Johnson Reynolds was well aware, and even acknowledged in his statements to law enforcement that he was being accused of

---

[5] Rebutting or impeaching the declarant does not waive one's confrontation objection. *See* Texas Rule of Evidence 806, and its identically worded federal counterpart, Rule 806(E), F.R.Ev. *See U.S. v. Moody,* 903 F.2d 321, 328-9 (5th Cir. 1990). Nor will the rule of completeness excuse the violation of the accused's 6th Amendment protection, *see Crawford v. Washington,* 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L.Ed.2d 177, 199 (2004), any more than the "opening the door" exception, this court recently rejected in *Hemphill v. New York,* 142 S. Ct. 681, 694, 211 L.Ed.2d 534 (2022).

being "in the middle" of this crime,[6] and that he "primed" Shepard to make his "confession" for the purpose of providing same to Crime Stoppers and the authorities in order to lay blame off on others and divert attention from himself.[7]

Accordingly, Reynolds had every reason and motive to provide law enforcement with such accusatory statements in order to curry favor with the authorities and shift the focus of the investigation away from himself. Reynolds hardly qualifies as a good samaritan, simply passing on idle chatter among friends. One could hardly imagine a more accusatory statement obtained and provided to law enforcement for the "purpose of accusing a targeted individual of engaging in criminal conduct" to serve his own purpose. *Williams*

---

[6] Reynolds testified that "Shepard was apparently accusing me of things . . . so I talked to my mom, I said, 'You know . . . I'm starting to get accused in the middle of this.' " 8RR80. *See also* 3SuppR4195:4-16, 8RR156:13-25;157:1-9 and *See* 9RR42:3-4 & 13-14 where Reynolds testified that "I think he wanted to dump it [the murder] on me."

[7] Under cross-examination Reynolds testified that he had "primed" Shepard in order to obtain information he could pass on to Crime Stoppers and law enforcement.

> "Q: [Defense Counsel] You told Detective Johnson you were *priming* him didn't you?
>
> A: Those words?
>
> Q: Those words.
>
> A: If it's in there then maybe that's what I said." (emphasis supplied)

8RR156:13-25-157:1-9.

v. Illinois, 567 U.S. 50, 83, 132 S. Ct. 2221, 183 L.Ed.2d 89 (2012).

Reynolds obtained and provided these statements to law enforcement for one purpose, and one purpose only, to curry favor with the police and lay blame off on others; as Reynolds understood at the time he provided these unconfronted hearsay statements to the authorities that he had been implicated as a co-conspirator in a capital murder. 9RR42-45.[8]

In *Crawford*, this Court recognized that any "pretrial statement that declarants would reasonably expect to be used prosecutorially" would qualify as "testimonial" for *Crawford* purposes. *Crawford v. Washington*, 541 U.S. 36, 52, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177, 193 (2004). Reynolds acknowledged in his statements to law enforcement that he was accused of being "in the middle" of this crime, and wished to lay blame off on others. These unconfronted hearsay statements recounted by Reynolds to Detective Johnson and in turn to the jury were "testimonial."

What is troubling about this scenario is that over repeated and timely objection the prosecution was permitted to present unconfronted hearsay statements over specific and timely confrontation objection, while at the same time the defense was precluded from

---

[8] Contrary to the Respondent's assertion in their brief, Reynolds' revelation was not "spontaneous." Br. 13. It is clear from Reynolds' testimony that he elicited the alleged confession in order to curry favor with the authorities and lay blame off on others, namely Shepard and Petitioner.

offering the declarant's repeated recantations, including prior sworn courtroom testimony and video statements by that same declarant to rebut the prosecution's unconfronted hearsay.[9]

II. With respect to Chapman's harmless error standard.

While the Court below recites the *Chapman* test, it actually applies a sufficiency of evidence test when deciding constitutional error. It upheld this conviction by deciding that the cell site location data (CSLI) obtained without a warrant had "a minimal effect" on the verdict, was not the "pillar" of the state's case," and was "not particularly significant in light of the evidence from Shepard's phone." This CSLI was obtained in 2015 within weeks of the second trial. So, the evidence was not presented to the first deadlocked jury.

The CSLI data was used to paint Petitioner's testimony as untruthful. In fact, it was the notion that

---

[9] When defense counsel attempted to offer Shepard's repeated recantations, the trial court granted the prosecutions hearsay objection.

> [DEFENSE COUNSEL]: Here in this courtroom you know that David Shepard has repeatedly said, "Mike Dixon did not pay me for this murder." . . . You're aware that as recently as two weeks ago David Shepard told Matt Powell –
>
> [PROSECUTOR]: Objection, hearsay.
>
> THE COURT: Sustained.

7RR141:24-25;142:1-16.

the jury could have found Petitioner's testimony untruthful that the Texas Court of Appeals used to find sufficiency of the evidence in its first opinion. *Dixon v. State*, 556 S.W.3d. 338 (Tex. App.-Amarillo 2018).

Since the Court of Criminal Appeals found that the CSLI had an effect on the verdict, it should have reversed the conviction under *Chapman*.

III. With respect to courtroom closures

Because this case involves three ways a proceeding might be closed, it presents an ideal opportunity to clarify, the disparate, varying, and often confusing law[10] concerning the right to a public trial. Here, the proceeding was closed once inadvertently, and on two other occasions intentionally closed completely and partially. On all three occasions the error was preserved. Counsel objected to the exclusion of the media from jury selection upon discovering same, the Texas Court of Appeals found counsel had preserved the error, App. at 130, n. 27; counsel preserved the complete closure of the courtroom since it remained closed despite counsel's vociferous and repeated objections; and the Court of Criminal Appeals found that the partial closure during closing argument was preserved.

And it has essentially invited this Court to provide guidance concerning the varying modifications of the *Waller* test in *Williams v. State*, ___ S.W.3d ___, 2022

[10] These include the overriding interest, substantial reason, triviality doctrine and other tests.

WL 4490406 (Tex. Crim. App. 2022) (discussing various tests and finding purposeful court closure was "trivial" applying no *Waller* factors). Here, the Texas Court of Criminal Appeals' opinion similarly did not apply *Waller* to the closures.

Instead, it treated the closure as a trivial matter by relying on the trial court's improper *post hoc*[11] recollection that the courtroom was full on the third occasion when the proceeding was partially closed.

CONCLUSION

The court should grant Certiorari in order to address these three unique and pressing issues:

(1) Whether *Crawford* should be a one-way street, allowing the prosecution to present unconfronted hearsay statements over specific and timely objections, while at the same time preventing the defense from offering repeated recantations, including sworn courtroom testimony and video statements by that same declarant in order to rebut same?

(2) Whether the Texas Court of Criminal Appeals is applying a sufficiency of the

[11] The Texas Court of Appeals-Amarillo abated the appeal and remanded the case to the trial court to issue findings of fact and conclusions of law concerning the court closures. Such *post hoc* determinations are disallowed under *Waller v. Georgia*, 467 U.S. 39, 49 n. 8, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984).

evidence test for constitutional error in contravention of *Chapman v. California*.

(3) Whether the Court should reverse the Texas Court of Criminal Appeals and clarify the confusing and often disparate standards that various courts apply for determining what constitutes the violation of a defendant's 6th Amendment right to a public trial?

Respectfully submitted,

GOLDSTEIN & ORR

GERALD H. GOLDSTEIN*
CYNTHIA H. ORR
JOHN GILMORE
AARON M. DIAZ
CARIN GROH
310 S. St. Mary's Street
29th Floor – Tower Life Building
San Antonio, Texas 78205
210-226-1463
gerrygoldsteinlaw@gmail.com

**Counsel of Record*

Attorneys for Petitioner