No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERIN GRAHAM, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1) Whether the introduction of a co-defendant's inculpatory hearsay statements about her alleged co-conspirator, made to law enforcement following a domestic incident that police had under control, violated the Confrontation Clause when the Government introduced the statements in the trial for a different ongoing alleged criminal offense that continued well beyond the completed domestic incident?

OPINION BELOW

The decision of the Court of Appeals for the Seventh Circuit ("Seventh Circuit") is a published opinion. The opinion is attached as Appendix A and is reported at *United States v. Graham*, 47 F.4th 561 (7th Cir. 2022). The Seventh Circuit denied a timely-filed petition for rehearing and suggestion for rehearing *en banc*. That Order is attached as Appendix B.

JURISDICTION

On August 29, 2022, the Seventh Circuit entered its opinion in Mr. Graham's appeal. The opinion affirmed Mr. Graham's conviction.

On October 11, 2022, following an extension from the Seventh Circuit, Mr. Graham timely petitioned for rehearing and suggested rehearing *en banc*. On October 28, 2022, the Seventh Circuit denied Mr. Graham's rehearing petition.

On January 3, 2023, in Application No. 22A569, Associate Justice Amy Coney Barret granted Mr. Graham's application for an extension of time to file this petition. The deadline was extended to March 13, 2023.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."

INTRODUCTION

This Court has addressed circumstances in which whether an ongoing emergency exists is informative of whether statements made may violate the Confrontation Clause. These cases created and explored the "primary purpose" test. *Ohio v. Clark*, 578 U.S. 237 (2015); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Davis v. Washington*, 547 U.S. 813 (2006); and *Hammon v. Indiana*, 546 U.S. 1213 (2006).[1] Mr. Graham's case presents the Court with an opportunity to clarify that test in situations where the statements were made after what could be considered an emergency, but was still during a much longer alleged criminal conspiracy that formed the basis for eventual prosecution. This case would allow the Court to establish the outer bounds to the "primary purpose test" and "ongoing emergency" precedent.

While Patience Moore, Mr. Graham's co-defendant, was restrained, separated from Mr. Graham, and questioned by officers regarding past conduct, she made statements inculpating Mr. Graham in past criminal conduct. This occurred during the time of the alleged criminal conspiracy to which Mr. Graham and Ms. Moore were a part and Ms. Moore was not a victim, but a co-conspirator. Under *Clark*, *Bryant, Davis,* and *Hammon*, the inquiry becomes what her "primary purpose" was in making those statements. The Seventh Circuit held that the "primary purpose" was to

[1] In the Seventh Circuit's opinion, *Hammon* is cited in this fashion, which is to an Order from the Supreme Court. However, the merits decision is consolidated with *Davis*, so the body of the text is located there. For consistency, this brief cites to the case in the manner the Seventh Circuit's opinion does for the overall citation, but to the consolidated *Davis* opinion when particular facts or legal principles are at issue.

respond to an ongoing emergency. But the "ongoing emergency" was not that of the domestic situation of which the responding officers were aware. Rather, it was that of the months-long criminal conspiracy that continued well after Ms. Moore, a co-conspirator, was arrested, questioned, and released from custody due to the events of that day. Such a broad reading of the "primary purpose" test and "ongoing emergency" exception threatens to significantly erode the confrontation right as Justices have cautions before, bordering on eliminating it during alleged criminal conduct.

Second, to the extent the Seventh Circuit's opinion addresses the harmfulness of an error were it to reach the Confrontation Clause violation, it misapplies the standard in this type of case based on inaccurate characterizations of the record. The panel opinion appears to apply a portion of the harmless error analysis, rather than the complete standard the Supreme Court and Court outlined in *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)), which places the burden on the Government to show that the error had no effect beyond a reasonable doubt. As a result, Mr. Graham's case also presents an opportunity for the Court to reexamine harmless error analysis for Confrontation Clause violations.

STATEMENT OF THE CASE[2]

The district court recognized that the Government had committed "potentially a confrontation clause violation." (Trial Tr. 4A-9:1-7; App. A-18.)[3] Indeed, the Government had shown jurors police body camera footage in which an alleged co-defendant, who was also a co-conspirator, claimed that the defendant, Erin Graham, had kidnapped and prostituted women. The Government presented the videos through testimony from an officer, who repeated those same allegations. The district court permitted this testimony, apparently expecting that the co-defendant would later testify. But at the last moment and only after showing the videos and having the officer repeat the prejudicial statements, the Government elected not to present the co-defendant.

The Government claimed that the testimony of the alleged co-conspirator, who was in federal custody, would be an unmitigated disaster. The Government informed the district court that no one could "control her in front of the jury" and that "to say she is a handful would be an understatement." (Trial Tr. 3P-9:21-22; App. A-7.) The statements relate to an altercation in Grand Chute, WI, when officers responded to a domestic violence call.

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[2] The following abbreviations are used herein: Criminal Record on Appeal, cited by document number and page: "R. __:__," Appellate Court Record, cited by document number and page: "App. R. __:__," and Sentencing Transcripts, cited by page and line: "Sent. Tr. __:__.

[3] Transcripts of the trial proceedings are cited by page and line as (Trial Tr. XY-__:__), with X being the day of trial, and Y being "A" for the morning session or "P" for the afternoon session. All other transcripts are cited by the nature of the hearing. For example, (Final Pre-Trial Conf. Tr. 38:2-10) is a citation to the final pretrial hearing.

"[Erin Graham's] over here prostituting bitches! He kidnapped me from fucking New York," Patience Moore shouted over an officer. (Gov. Ex. 72 at 0:05.)[4] "He pimp me for fucking a year and a half." (Gov. Ex. 69 at 2:04.)

Ms. Moore had found herself in police custody outside the Red Roof Inn in Grand Chute, WI, after a domestic altercation with Mr. Graham escalated to the point that she threw rocks at him. Later, an officer tried to calmly remind a more reserved Ms. Moore that the officers, and not her, were in control of the situation. (Gov. Ex. 69 at 0:16.)

"No, you're not," she replied. (Gov. Ex. 69 at 0:18.) As an officer explained the situation to another officer who just arrived, Ms. Moore shouted about her partner again for all the police officers to hear. "He's a pimp. He's got a 19-year-old prostitute, and he took her from New York … your name is Erin Graham." (Gov. Ex. 69 at 0:49-1:00.)

Mr. Graham met Ms. Moore in Florida a few years before the incident at the Red Roof Inn while both were living at another hotel. (Trial Tr. 4P-53:14-54:1.) Mr. Graham became friends with Ms. Moore and her friend, Diamond. (Trial Tr. 4P-54:12-23.) As their friendship grew, there were multiple times when Ms. Moore and Diamond asked for Mr. Graham's help removing men from their rooms at the hotel. (Trial Tr. 4P-55:1-11.) Eventually, Ms. Moore and Diamond told Mr. Graham, who had no experience in the commercial sex industry, they were prostitutes. (Trial Tr.

[4] The Government showed three body camera videos as a part of this testimony. The exhibits, marked Government Exhibits 69, 70, and 72, were made a part of the record on appeal, (R. 272), and are cited by time of the video as (Gov. Ex. X at __:__.)

4P-55:10-11.) Ms. Moore and Diamond eventually persuaded Mr. Graham to drive them to and from "dates" with their customers. Ms. Moore and Diamond agreed to pay Mr. Graham for his driving services. (Trial Tr. 4P-56:22-25, 4P-57:1.) They also showed him how to post ads for the "dates" online. (Trial Tr. 4P-58:20-21.) A few months later, the relationship moved beyond just business to a more intimate level between all three members. (Trial Tr. 4P-57:4-6.)

In 2015, Mr. Graham, Ms. Moore, and Diamond moved to Wisconsin, where Mr. Graham is from originally. (Trial Tr. 4P-51:25-52:1; 4P-59:13-14.) Diamond did not take to Wisconsin and quickly moved to New York. (Trial Tr. 4P-59:16-22.) With Diamond out of the picture, Mr. Graham and Ms. Moore's relationship became more profound and more intimate, even though he served as her driver to and from "dates" for the next few years. (Trial Tr. 4P-59:23 - 60:8.)

Cinderria Harwell, Krystle Jischkowsky, and Kelsey Lannert entered Mr. Graham and Ms. Moore's lives during this period. Mr. Graham and Ms. Harwell met when she approached him at a mall, (Trial Tr. 2A-99:16-20), after moving to Wisconsin when she was 18. (Trial Tr. 2A-94:21-23.) She was in her late teens during their relationship and the events leading to this case. (Trial Tr. 2P-94:21-95:3.) Ms. Harwell spoke at length about how Mr. Graham and Ms. Moore told her about "dates," with Ms. Moore taking the lead on Ms. Harwell's prostitution. (Trial Tr. 2A-130:6.)

Mr. Graham met Ms. Jischkowsky when a mutual acquaintance brought her along to purchase cocaine from him, (Trial Tr. 3P-56:2-14), and several months later Ms. Jischkowsky asked her acquaintance for Mr. Graham's number so she could

contact him. (Trial Tr. 3P-59:24-25.) Mr. Graham met Ms. Lannert at a mutual friend's wedding. (Trial Tr. 3P-139:14-19.) Ms. Lannert later obtained his phone number to contact him to buy cocaine. (Trial Tr. 3P-140:23-25.)

During this period from 2015 up until Mr. Graham was arrested leading to this case, he similarly worked with Ms. Harwell, Ms. Jischkowsky, and Ms. Lannert. He ensured they remained safe while on "dates" with their clients. (Trial Tr. 2A-18:24-25.) They would text Mr. Graham to confirm they were safe ten minutes after entering a room with a client. (Trial Tr. 2A-42:15-16.) It was this work that prompted Mr. Graham's human trafficking and commercial sex charges.

The defense freely admitted from the outset of the trial that "[p]rostitution occurred in this case." (Trial Tr. 1P-26:11.) There was no question that commercial sex activity was ongoing, and the record is filled with such examples. But the dynamic between the individuals evolved, with each relationship adding new layers of emotion and intrigue to the group. Ms. Harwell saw herself, Mr. Graham, and Ms. Moore as a family. (Trial Tr. 2P-128:3-5.) But the relationship between the three involved a complex sexual dynamic. (Trial Tr. 2P-147:21-25; Trial Tr. 2A-115:1-2.) Mr. Graham also had consensual sexual relations with Ms. Jischkowsky before she became directly involved in any commercial sex activity. (Trial Tr. 3P-72:9-11.) Ms. Moore was jealous of Ms. Jischkowsky and Mr. Graham's relationship. (Trial Tr. 2P-20:14-15.) Although Ms. Lannert first befriended Mr. Graham to acquire cocaine, their relationship also turned consensually sexual. (Trial Tr. 3P-147:1-7.) Ms. Lannert engaged in a sexual relationship with Mr. Graham despite knowing he had "another

girlfriend." (Trial Tr. 3P-147:10-14.) The complications spiraling out of this web of people, their emotions, and their relationships ultimately led to this case.

On January 30, 2019, Mr. Graham and Ms. Moore were named co-conspirators in Count 1 of a second superseding indictment, allegedly conspiring to cause adult females to engage in a commercial sex act, in violation of 18 U.S.C. § 1591(a)(1). (R.123.) And they were named co-defendants in Counts 2, 3, and 5, of the same indictment for knowingly causing "Known Victim 1" (Cinderria Harwell) (Trial Tr. 5A-94:7-8), "Known Victim 2" (Krystle Jischkowsky) (Trial Tr. 5A-94:17-18), and "Known Victim 4" (Kelsey Lannert) (Trial Tr. 5A-95:11-12) to engage in a commercial sex act. Mr. Graham and Ms. Moore were also named co-defendants in Count 4 for knowingly attempting to cause "Known Victim 3" (Cynthia Selenka) (Trial Tr. 5A-95:1-2) to engage in a commercial sex act.[5]

On April 8, 2019, Mr. Graham's trial commenced. Throughout the litigation, including right before the jury selection and first witness, the Government repeatedly expressed its intentions to call Ms. Moore as a witness. During the final pretrial conference on March 27, 2019, the Government reported it had filed a request to the Department of Justice's Office of Enforcement Requests (OEO) for immunity for Ms. Moore. (Final Pre-Trial Conf. Tr. 38:2-10.) The first morning of the trial during the final hearing, the attorneys for the Government advised the district court that their

[5] The Grand Jury indicted Mr. Graham with one count in violation of 18 U.S.C. § 1594(c); three counts in violation of 18 U.S.C. § 1591(a)(1) and (b)(1); one count of knowingly attempting to violate 18 U.S.C. § 1591(a)(1) and (b)(1); and two counts in violation of 18 U.S.C. § 2421. (R.123.)

request for immunity for Ms. Moore was approved, but that the situation was "dynamic" and that they did not know if Ms. Moore would testify pursuant to a proffer agreement or whether they would have to issue immunity and ask the district court to compel her to testify. (Trial Tr. 1A-7:1-7.)[6] But at no point did the Government reveal there was a chance it would not call her. During *voir dire*, the district court asked the Government to read its witness list to the jury, skipping anyone it did not plan to call. (Trial Tr. 1A-45:16-46:2.) The Government read Ms. Moore's name in its witness list. (Trial Tr. 1A-46:5.) During its opening statements to the jury, the Government repeatedly referenced Ms. Moore as a co-conspirator. (*See* Trial Tr. 1P-5:4-25:6.) The indictment, provided to the jury, also lists Ms. Moore as a named co-defendant and co-conspirator. (Trial Tr. 1A-16:8-9.) Despite all this discussion, the opening statements and initial Government witnesses proceeded without further record of any position about whether the Government would call Ms. Moore.

During the morning session of the third day of trial, the Government played videos marked as Government's Exhibits 69, 70, and 72, that law enforcement body cameras had captured following the altercation between Mr. Graham and Ms. Moore at the Red Roof Inn in Grand Chute. (Trial Tr. 3A-130:21-142:5.) The Government played the videos while its witness, Grand Chute Police Department Officer Travis Waas, was on the stand. (Trial Tr. 3A-131:19-21.) The Government called Officer Waas to testify about what happened after the domestic altercation between Ms.

[6] There are two different transcripts of the morning session of the first day of trial: one without *voir dire* transcribed and one with *voir dire* transcribed. The citations herein are to the complete transcript of the first morning, with both the final hearing and *voir dire* transcribed.

Moore and Mr. Graham at the Red Roof Inn, as he was one of the responding officers. (Trial Tr. 3A-129:7-23.) While the video played, Officer Waas stated that it was kind of hard to understand what was going on in the videos and what the various parties were saying. (Trial Tr. 3A-131:23-132:6.) When he asked for part of a video to be replayed, the Government provided him with transcripts it had created. (Trial Tr. 3A-133:18-25.)

The Government directed Officer Waas to highlight several allegations Ms. Moore made against Mr. Graham, alleging that "he's got a 19-year-old-prostitute and that he had taken her from New York." (Trial Tr. 3A-134:21-22.) Officer Waas testified that Ms. Moore said Mr. Graham "had been pimping her for a year and a half," and "it was the worst year and a half of her life." (Trial Tr. 3A-135:16-19.) When Ms. Moore kept yelling in the video, the Government once again directed Officer Waas to repeat what Ms. Moore was saying, and he asserted "that he's prostituting." (Trial Tr. 3A-138:23-24.)

Officer Waas also testified about the outcome of the Grand Chute altercation. Responding officers to the domestic incident had separated Ms. Moore and Mr. Graham; Ms. Moore was in the parking lot, (Trial Tr. 3A-138:1-2), while Mr. Graham walked upstairs with another officer to answer questions and provide identification. (Trial Tr. 3A-134:24-25.) The parties were separated, the alleged assault have involved fists and rocks, and multiple officers were on the scene. Mr. Graham and the officer interviewing him stood outside of his room and the officer could see two women inside, one aged about 19. (Trial Tr. 3A-136:1-7.) The officers ultimately arrested Ms.

Moore for domestic disorderly conduct because one of them had observed her throwing rocks at Mr. Graham. (Trial Tr. 3A-140:8-12.) Meanwhile, Officer Waas had asked Mr. Graham to complete a domestic violence packet for victims, but Mr. Graham refused. (Trial Tr. 3A-145:10-17.) After the Government played the Grand Chute videos and Officer Waas had left the stand, trial recessed for a mid-day break. (Trial Tr. 3A-146:20-25.)

Following the break, shortly after the Government played the Grand Chute videos and used Officer Waas to highlight Ms. Moore's statements, the defense and the district court discovered for the first time that the Government was unsure that it would call Ms. Moore as a witness. (Trial Tr. 3P-2:22-5:5.) Although the Government said it could make sure Ms. Moore was transported to the district court from the Dane County Jail, it might not call her as a witness. (Trial Tr. 3P-5:15-17.) The Government asserted that it did not want to call Ms. Moore because she was "going to be a highly problematic witness," for the Government. (Trial Tr. 3P-9:2-22.) The Government suggested that if it called Ms. Moore there could be a mistrial and asserted "to say she is a handful would be an understatement." (Trial Tr. 3P-9:21-22.) The Government concluded, without elaboration, that putting Ms. Moore on the stand through immunity and compulsion would "jeopardize the trial itself." (Trial Tr. 3P-10:11.)

Having found out the Government might no longer call Ms. Moore to testify, the defense raised a Confrontation Clause objection. (Trial Tr. 3P-2:22-5:5.) The defense argued that Ms. Moore's statements were testimonial (Trial Tr. 3P-6:12-25),

and that Mr. Graham had a right to cross-examine her. (Trial Tr. 3P-7:1-21.) The defense noted that only the Government had the ability to grant Ms. Moore immunity and compel her to testify. (Trial Tr. 3P-7:3-6.) Otherwise, the defense pointed out, she would be unavailable to the defense without a prior or current opportunity to cross-examine her. (Trial Tr. 3P-7:3-6.) The defense reasoned if Mr. Graham called Ms. Moore, she would invoke her Fifth Amendment right to remain silent. (Trial Tr. 3P-7:1-7.) To remedy the violation, the defense first requested that the district court strike all of Officer Waas's testimony and the videos, otherwise the case was "in mistrial territory." (Trial Tr. 3P-5:1-5.)

The district court did not initially overrule the defense's objection or decline to issue a curing instruction. (Trial Tr. 3P-4:13-24.) Rather, it asked the defense to point out the specific problematic statements so that the court could give an instruction to the jury to "give no credence or consideration," to any of the prejudicial testimonial statements. (Trial Tr. 3P-11:4-10.) Yet the district court reserved judgment on when to give the instruction and the full scope of the instruction. (Trial Tr. 3P-13:1-4.)

When trial reconvened later the third day, the district court had not yet issued its instructions to the jury regarding Ms. Moore's statements. (Trial Tr. 3P-13:1-13.) The jury was not made aware there had been a potential Confrontation Clause violation or any other issue with Officer Waas's statements or the videos. (Trial Tr. 3P-13:1-13.)

Having highlighted Ms. Moore's statements that Mr. Graham was prostituting her and other women, including apparently a 19-year-old from New York, the

Government immediately called the witnesses it had designated as other "known victims" to testify about their encounters with Mr. Graham. (Trial Tr. 3P-13-155.) Ms. Jischkowsky testified that she had picked up drugs from Mr. Graham, (Trial Tr. 3P-56:12-13), he suggested she should go on "dates," (Trial Tr. 3P-72:15-17), and that he had posted an ad for her. (Trial Tr. 3P-73-6.) Similarly, Ms. Lannert testified how she had learned from Ms. Moore, Mr. Graham, and Ms. Harwell that they were engaging in prostitution, (Trial Tr. 4A-24:16-24), that Ms. Moore told her she needs to "pull her weight," (Trial Tr. 4A-35:6-16), and that her first "date" was April 4th or 5th. (Trial Tr. 4A-38:7-11.)

After that testimony from the "known victims," late in the afternoon on the third day of trial, the defense renewed its Confrontation Clause objection. (Trial Tr. 3P-89:11-17.) The defense sought clarification on when the district court would like the defense to highlight the specific problematic statements, and when the court would issue its instruction to the jury to disregard those specific portions of the video. (*Id.*) The district court replied that the issue would be raised at the instruction conference. (Trial Tr. 3P-89:23-24.)

On the last full day of trial, the Government declared it had made the final decision not to call Ms. Moore as a witness. (Trial Tr. 4A-11:15-19.) It reiterated its core concern that it did not think it could "control her in front of the jury." (Trial Tr. 4A-17:19-20.)

The defense asked the district court to reconsider its ruling about the potential Confrontation Clause violation. (Trial Tr. 4A-3:11-14.) It also reasoned that, even if

Ms. Moore's statements were not testimonial, her statements were inadmissible hearsay and should be stricken since the significantly prejudicial nature of false statements about kidnapping outweighed any probative value the statements might have had. (Trial Tr. 4A-6:16-24.) To cure the issue, the defense asked for a mistrial if the Government would not call Ms. Moore. (Trial Tr. 4A-7:12-14.) Alternatively, the defense asked the district court to reconsider the scope of the intended instruction and strike both Officer Waas's testimony and the videos in their entirety. (Trial Tr. 4A-13:24-25.)

The district court declined to grant a mistrial. (Trial Tr. 4A-11:14-15.) It did state it would broaden the scope of the instruction and would instruct the jury to disregard everything Ms. Moore said in the videos. (Trial Tr. 4A-14:11-12.) Yet it did not mention completely striking Officer Waas's testimony. (Trial Tr. 4A-14:9-16.)

The district court and parties then turned from the scope of the instruction to the timing of delivery. (Trial Tr. 4A-19:22-20:24.) The Government was concerned about giving the impression it had engaged in any misconduct by playing the videos when it planned not to call Ms. Moore; it was "more worried about the effect on the jury to draw such a significant highlight to it," than about giving the curing instruction as soon as possible. (Trial Tr. 4A-20:3-7.) The defense requested a timelier curing instruction. (Trial Tr. 4A-8-12.) The district court decided not to instruct the jury on Ms. Moore's statements until it was certain that Ms. Moore would not testify, even though the Government said it would not be calling her to testify. (Trial Tr. 4A-20:21-25.)

Finally, after the morning session of the last full day of trial, about 24 hours after Officer Waas had testified, the videos were shown, and the other "known victims" were called, the district court instructed the jury as follows:

> Yesterday we watched a video in which Patience Moore made statements during an incident at the hotel in Grand Chute. We have now been informed that Ms. Moore will not be testifying. Accordingly, you can't consider anything that Ms. Moore said in that video because Ms. Moore can't be cross-examined about those statements. You can consider the video itself and statements made by other participants. *This instruction is specific to the video that we saw yesterday, and it doesn't relate to your consideration of any other evidence or testimony in the case.*

(Trial Tr. 4A-160:4-12.) (emphasis added). The instruction was limited in scope to Ms. Moore's statements in the Grand Chute videos. (Trial Tr. 4A-160:4-12.) The district court did not instruct the jury to disregard any aspect of Officer Waas's testimony that had highlighted and repeated Ms. Moore's statements from the videos. (Trial Tr. 4A-160:4-12.) The district court issued the instruction once and did not renew its curing instruction after the trial ended during the final instructions to the jury. (Trial Tr. 5A-91-109.) At the same time, the jury was reminded of the videos. The Government, in its closing, pointed the jury back to those same videos for consideration during its deliberations. (Trial Tr. 5A-122:21-25.)

The jury convicted Mr. Graham of all counts. (Trial Tr. 5A-176:22-177:17.) The district court sentenced him to incarceration for 25 years, followed by a 20-year supervised release term for each count. (Sent. Tr. 48:12-16.).

Mr. Graham appealed this matter to the Seventh Circuit, arguing that this was a Confrontation Clause violation because Ms. Moore made incriminating

statements in response to law enforcement questioning. She also did so in a manner making them testimonial statements: in response to police, describing past events, and after a domestic incident had completed. (App. Br. 21-33.) He also discussed how because Ms. Moore was a co-defendant, there was no need to prove prejudice in the mistrial determination. (App. Br. 33-39.) In the alternative, Mr. Graham explained how the district court's curing instruction was insufficient. (App. Br. 39.)

The Seventh Circuit rejected Mr. Graham's positions. *United States v. Graham*, 47 F.4th 561 (7th Cir. 2022). Rather than determine that there was a Confrontation Clause violation, as the district court had done, the Seventh Circuit held that the statements were not testimonial. In reviewing the statements, the panel opinion focused on the distinction between law enforcement responses to ongoing emergencies versus those interrogations aimed at past events. *Id.* at 568-69; (App. A-12-13) (citations omitted). The panel noted that an emergency determination is highly contextual, but generally exists when there remains a dangerous ongoing threat to others, disregarding a review of the domestic incident itself. *Id.* at 568 (citing *Davis* 547 U.S. at 827); (App. A-13). The court held this was an ongoing emergency relating to the later charged federal offense. *Id*. The panel opinion determined Ms. Moore's statements to be "spontaneous[]" and because of the alleged emergency, the statements "objectively indicat[ed] that the officers' primary purpose was to resolve the ongoing emergency of a fight in progress and sex trafficking." *Id.* at 569; (App. A-14). The panel opinion felt Mr. Graham's analogy to *Hammon,* a domestic incident

with the parties separate, controlled, and describing past events was "unpersuasive." *Graham*, 47 F.4th at 569; (App. A-14).

The Seventh Circuit then addressed the potential harmfulness of the error should it have found one. *Id.*; (App. A-15-16). In doing so, the panel opinion noted that context was important regarding the alleged error and its impact on the strength of the Government's case, and that the harmless error review was driven by whether the exclusion of the evidence would make the Government's case significantly less persuasive. *Id.* (citations omitted); (App. A-15-16).

That said, the panel opinion felt that the Government's case against Mr. Graham was "very strong." *Id.* In determining that the statements were not harmful, the panel opinion felt that Ms. Moore's statements about kidnapping and otherwise physically coercive conduct, those statements of an identified co-defendant and co-conspirator "simply confirmed what Graham conceded." *Id.* At the same time, the panel opinion notes he admitted to prostitution, but not using force or coercion. *Id.* The panel opinion also felt that these repeated references to kidnapping did not describe forceable conduct. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Determination that Ms. Moore's Accusations About Mr. Graham Were Non-Testimonial Presents New Territory in the Supreme Court's Precedent Involving the Statement's Primary Purpose and Ongoing Emergencies.

In response to police questions, Ms. Moore accused Mr. Graham of criminal conduct unrelated to the nature of police response and the situation that had preceded the officer's dispatch. The district court determined that Ms. Moore's statements were hearsay and testimonial. Yet contrary to Supreme Court precedent, the Seventh Circuit determined that the statements were spontaneous and objectively establishing a law enforcement response to the allegations Ms. Moore levied. *Graham*, 47 F.4th at 569; (App. A-14). The opinion appears to solely rely on a determination of an ongoing emergency for that conclusion, an "emergency" that continued for weeks and months. This conflicts with the facts and incorrectly applies the Supreme Court's test from *Clark*, *Bryant*, *Davis*, and *Hammon* and the Court should issue a writ of certiorari to define the outer bounds of any such "ongoing emergencies."

Statements are testimonial when they are "made under circumstances which could lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). Statements made during police interrogations are testimonial when the circumstances objectively indicate there is no ongoing emergency, and the primary purpose of the interrogation

is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 547 U.S. at 822. The Court "objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties." *Bryant*, 562 U.S. at 359.

In *Hammon*, this Court held that a police officer's testimony and victim's affidavit were testimonial. *Davis*, 547 U.S. at 820. Much as in Mr. Graham's case, police responded to a reported domestic disturbance at the Hammon's home. *Id.* at 819-20. After investigating the incident and hearing Amy's story, the officer had her fill out and sign an affidavit. *Id.* Amy did not testify at trial. *Id.* Instead, the State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit. *Id.* The Supreme Court determined that Amy's statements were testimonial because the circumstances objectively revealed there was no ongoing emergency; the disturbance leading to the response was over. *Id.* at 829–31. The Court held that, objectively, the primary purpose of the police questioning in *Hammon* was to discover what happened to assist in the prosecution of a past crime, just as it was here. *Id. See also Bryant*, 562 U.S. at 359 (Supreme Court determining statements were non-testimonial in the context of "a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim.")

At Mr. Graham's trial, the Government offered statements made in a near-identical situation, after the parties were separated, the physical altercation was

over, and law enforcement was investigating the nature of the alleged crimes prompting their response. This evidence, Government Exhibits 69 through 72, contained police body camera footage showing Ms. Moore detained in handcuffs with two officers. Ms. Moore appears to be in handcuffs throughout most of the footage. Ms. Moore begins by claiming "he kidnapped [her] from fucking New York." (Gov. Ex. 72 at 0:05-0:10.) Later, Mr. Graham can be seen standing with another officer on the second story balcony of the hotel. By this point, the parties were separated, and one of the officers was upstairs with Mr. Graham investigating the situation that preceded the police response. (Gov. Ex. 70 at 1:24.) The officer with Mr. Graham was taking notes on his notepad about the events that prompted the call. (*Id.*) Meanwhile, Ms. Moore, detained, in handcuffs, and surrounded by two officers is seen and heard shouting accusations about how "[Mr. Graham's] got a 19-year-old prostitute" and he "took [her] from New York." (Gov. Ex. 69 at 0:50; Gov. Ex. 72 at 0:05-0:08.)[7]

She had also made these accusations in response to police questioning. Ms. Moore told the officers, "he bring me all the way from fucking New York." (Gov. Ex. 69 at 1:56.) In response to her statement about Mr. Graham taking her from New York, the officer asked, "[i]s he pimping you?" (Gov. Ex. 69 at 2:00.) Ms. Moore says that "he pimped me for fucking year and a half . . . the worst year and a half of my life." (Gov. Ex. 69 at 2:04.) Following these events, Ms. Moore was arrested, while Mr. Graham was not.

[7] As discussed in Mr. Graham's reply brief, it appears that these accusations relate to two individuals, an unnamed 19-year-old and Ms. Moore herself. (Reply Br. 20.)

Ms. Moore made these statements while she was being and then was restrained, and additional officers were arriving on the scene. The officers had the situation under control and were separating and had then separated the parties. Mr. Graham complied with officer commands. When the officer told him to "stand by [his] car" he followed the officer's direction. (Gov. Ex. 72 at 0:23.) Ms. Moore was in the parking lot, and Mr. Graham was later on a balcony with an officer. Ms. Moore repeated her allegations after the two were separated during the officers' investigation. There was no active threat to the officers or any bystanders from the domestic incident, the questions asked and answered concerned past events, and the formality of the police encounter objectively show there was no ongoing emergency to which the officers were responding. The domestic battery had passed. The context of Ms. Moore's statements is essentially identical to the situation in *Hammon*. Thus, Ms. Moore's statements were testimonial, as the district court stated below.

In part based on an incorrect fact, the opinion misapplies this Court's test for whether a statement is testimonial. First, to the claim that Ms. Moore made the statements spontaneously, that is not fully accurate. While some statements were made without questions, many statements were repeated or otherwise stated in response to law enforcement questions prompting the response. (*See, e.g., Gov*. Ex. 69 at 2:00.)

Second, the Seventh Circuit relied on the federal offense, a crime that was not being investigated and was not analogous to the 'shooter on the run' situation from *Bryant* as the basis to determine that there was an "ongoing emergency." *Graham*,

47 F.4th at 568. The opinion appeared to treat this as dispositive, even though this Court cautioned that "whether an ongoing emergency exists is simply one factor ... that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Bryant*, 562 U.S. at 366. The Court in *Bryant* heavily relied on the public safety component of that case involving a loose suspect with a firearm as the basis for an ongoing emergency and the primary purpose of statements being neutralizing a threat. 562 U.S. at 372-73; *see also Langley v. State*, 421 Md. 560, 576 (2011) (discussing the Court's focus on an armed, roaming assailant and collecting cases doing the same).

Third, Ms. Moore was describing the past events of the matter leading to police response, a matter of domestic violence, like in *Hammon*. Given that police were investigating a domestic violence incident, arrested only Ms. Moore, and asked Mr. Graham to fill out a domestic violence victim form, it is incorrect to say that the "circumstances objectively indicat[ed] that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822. Rather, the situation "involved domestic violence, a known and identified perpetrator, and, …, a neutralized threat." *Bryant*, 562 U.S. at 363. Should the nature of "ongoing emergency" be expended to any criminal conduct that was occurring during the time of the alleged statements, there might always be an ongoing emergency and if that is determinative, the primary purpose test could be rendered a nullity. Justice Scalia raised these very concerns in dissent in *Bryant*. "Many individuals who testify against a defendant at trial first offer their accounts to police

in the hours after a violent act. If the police can plausibly claim that a 'potential threat to … the public' persisted through those first few hours, …, a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses." *Bryant*, 562 U.S. at 388-89 (Scalia, J., dissenting). The Seventh Circuit's ruling here goes well beyond those "first few hours" into the weeks and months that follow, effectively making any period before charging a part of a potential ongoing emergency.

Even were the emergency somehow able to be the federal offense that was not under investigation, Ms. Moore's statements relate to past events, not a current description of what is happening in the moment such as a 911 call while the alleged conduct is occurring. *Id*. at 827 (victim "was speaking about events *as they were actually happening*") (emphasis in original). Officers were on the scene, parties were separated and one in custody, and active investigation was occurring by multiple officers. The Court should accept this case to refine the primary purpose test and ongoing emergency doctrine to limit its potentially limitless scope.

Ms. Moore's accusatory statements to police were testimonial because an objective witness would reasonably believe that the statements would be available for use at a later trial. The statements were repeated accusations to police officers as stated by the testifying officer himself that Mr. Graham took part in criminal behavior. These accusations were unrelated to the purpose of the response and after the parties were separated and the alleged domestic incident had concluded. Importantly, "the existence of an ongoing emergency must be objectively assessed

from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight." *Bryant*, 562 U.S. at 361 n.8. No information suggests the parties were aware of federal investigation into human trafficking. Rather, this was the response to and investigation of a domestic incident. As the very duty of police officers is to investigate and arrest individuals engaged in criminal behavior, a witness to Ms. Moore's statements would likely conclude that her statements would be available in prosecuting Mr. Graham for the stated allegations. Thus, an objective look at the circumstances of Ms. Moore's statements indicates a primary purpose of accusing Mr. Graham of kidnapping and prostitution, both past events unrelated to whatever emergency may have existed before the police arrived. In determining that Ms. Moore's statements were non-testimonial because of an ongoing emergency related to the allegations she made for the first time when separated and police were on the scene, the opinion incorrectly applies the Court's primary purpose and ongoing emergency precedent. The Court should take this case to provide greater guidance for lower courts using this standard.

II. Mr. Graham's Case Presents an Opportunity to Clarify the Nature of Analysis for the Harmfulness of Confrontation Clause Errors.

Though the Seventh Circuit held that the statements were non-testimonial, it also addressed whether any error was harmless. *Graham*, 47 F.4th at 569; (App. A-15-16). In doing so, it only partially applied the analysis that pertains specifically to Confrontation Clause violations. *Van Arsdall*, 475 U.S. at 681. Together with the

incorrect determination about Ms. Moore's testimonial statements, the panel opinion incorrectly excuses a violation of Mr. Graham's Confrontation Clause rights.[8]

Once a court determines that a Confrontation Clause violation exists, it reviews the matter for harmlessness. The Government has the burden of proving that the violation was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 681. Previously that test had been described as "whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *United States v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1988) (quoting *Schneble v. Florida*, 405 U.S. 427, 432 (1972)). All the same, this Court noted that that is in the context of the Government bearing a significant burden given its unique position and role in Confrontation Clause violations. Given the allegations made, and when they were introduced in the trial, the case relating to all the victims was not significantly less persuasive.

The testimonial statements were allegations of a supposed co-conspirator in pimping and prostitution of several women, including the declarant. Further, Ms. Moore alleged that she and another 19-year-old woman, matching the description of the first "known victim," were kidnapped. These two, highly inflammatory statements (1) provided the most concrete statements of human trafficking here and (2) buttressed the other statements of alleged physical violence that formed the

[8] While addressing the later question of remedy of a Confrontation Clause violation, *Bruton v. United States*, 391 U.S. 123 (1968), as Mr. Graham discussed in his briefing, (App. Br. 32-37; Reply Br. 22-28), further demonstrates that testimonial statements by co-defendants are treated with greater care and concern because of co-defendants motivation to shift blame. This care and caution should also factor into any error's harmfulness.

Government's theory regarding the use or fear of force in the offence to conduct the alleged trafficking. Even though the jury was not reinstructed to disregard the statements in the videos in closing instructions, the Government reminded the jury in its closing argument to consider the videos from the Grand Chute arrest in its deliberations. (Trial Tr. 5A-122:21-25.) For over a page in the transcripts, well after the attempted curing instruction, the Government drew the jury's attention back to the incident in Grand Chute. "[Y]ou saw what happened. You saw that Patience left the room, that she made such a disturbance that the police were called. You saw how upset she was." (Trial Tr. 5A-123:7–9.) The jury never saw the alleged fight before police arrived. The jury only saw what happened after the officers arrived. As a result of the likely harm of the statements and Government's reminder just before the deliberations, the Government cannot meet its burden to prove these highly prejudicial statements did not impact the jury beyond a reasonable doubt.

The opinion incorrectly characterizes the circumstances in the case and misapplies the standard. In considering the context of the statements, the panel opinion characterized the kidnapping and prostitution allegations as "simply confirm[ing]" what Mr. Graham conceded and that the statements "merely parroted Graham's concessions at trial." *Graham*, 47 F.4th at 569-70; (App. A-15-16). This is incorrect. Mr. Graham conceded that commercial sexual activity occurred in the case. (Trial Tr. 1P-26:10-11.) He also noted his relationship to the participants engaged in that activity. Yet nowhere does he concede to physically kidnapping anyone or physically restraining anyone to engage in commercial sexual activity, or in the

dynamic conveyed by Ms. Moore's allegations. This characterization reveals the concern over introduction of such statements, that they will provide the context in which the jury or other observers would characterize past testimony and future witnesses at the trial. The statements did not repeat or confirm anything Mr. Graham said. Rather, they were the most concrete and widely-known-about example of human trafficking the jury heard around the testimony of the women involved.[9] As a result, the evidence was not cumulative or otherwise unimportant to the Government's case.

And the Government itself provided evidence of the importance of its own evidence. The Government went on for significant length drawing the jury's attention back to the videos they were just before instructed to ignore. (Trial Tr. 5A-122-123.) From the context of the case, as shown by the Government itself, the videos and their content were significantly persuasive enough for substantial attention at closing argument.

Lastly, the panel opinion state that Ms. Moore's statements "contained little, if any, information about force or coercion." *Graham*, 47 F.4th at 570; (App. A-16). That Ms. Moore at different times alleged kidnapping of both a 19-year-old and herself, it is hard to see her statements as definitely not containing information about force. *See, e.g.,* Wis. Stat. § 940.31 (listing force as an element of Wisconsin's kidnapping statute). To say that this information was not persuasive to the jury

[9] Polaris Project, *Myths, Facts, and Statistics*, https://polarisproject.org/myths-facts-and-statistics/ (last visited Oct. 8, 2022) ("The most pervasive myth about human trafficking is that it often involves kidnapping or physically forcing someone into a situation."); Lenore Skenazy, *Do Human Traffickers Kidnap Children?*, Let Grow, https://letgrow.org/do-human-traffickers-kidnap-children/ (last visited Oct. 8, 2022) (noting the increasing fears of kidnapping leading to human trafficking and their prevalence on social media).

because it was not a forceful/coercive crime conflicts with Ms. Moore's statements. The statements carried evidentiary force given its potential connection to one of the alleged victims of the offense and a concrete version of alleged coercive force.

The opinion rested its analysis not on the Government carrying a heavy burden of proving harmlessness beyond a reasonable doubt, but on a conclusion that the jury could not be persuaded by confirmation of conceded facts or facts that did not show force or coercion. But that conflicts with the statements made and the context of the case and does not appear to place the burden on the Government. As a result, the opinion failed to hold the Government to its burden and contradicted the standard for harmless error in Confrontation Clause cases. This Court should accept Mr. Graham's case to clarify the harmlessness analysis to significant Confrontation Clause violations.

CONCLUSION

For these reasons, Mr. Graham asks the Court to issue a Writ of Certiorari and review this case on the merits.

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