No. 23-6952

ORIGINAL

IN THE

Supreme Court of the United States

FRANTZ BRIFIL,
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Ricky D. Dixon, and
ATTORNEY GENERAL OF FLORIDA, Ashley Moody,
Respondent(s).

PETITION FOR WRIT OF CERTIORARI

Frantz Brifil, DC# K64868
Petitioner, Pro Se
DeSoto Correctional Institution Annex
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

QUESTION PRESENTED

I. WHETHER THE STATE COURT VIOLATED THE MANDATE OF CRAWFORD AND PROGENY BY INTRODUCING A NON-TESTIFYING WITNESS'S OUT-OF-COURT STATEMENTS?

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Statutes

Constitutional Provisions

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 **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court having jurisdiction decided my case was November 30, 2023. A copy of that decision appears at Appendix A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

United States Constitution Amendment XIV "No State shall make or enforce any law which [...] shall deprive any person of life, liberty, or property, without due process of law.

United States Constitution VI Amendment, the accused has the right to confront the witness against him.

United States Code Annotated Title 28 §1257: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of the statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where ay title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States".

STATEMENT OF THE CASE

Petitioner was arrested and charged with attempted first degree murder and aggravated assault. Petitioner pled not guilty and proceeded to a jury trial.

At trial, the state sought to introduce the out-of-court statements of Petitioner's daughter into evidence as State's Exhibit 8 and 9. Defense counsel objected based on hearsay and confrontation clause violations under Crawford. T.T. , Pg. 255. The court removed the jury and held a hearing. There, defense counsel fully argued the witness's out-of-court statements do not qualify as excited utterance. Additionally, defense counsel argued that the admission of those statements would violate Petitioner's right to confront the witness against him because the statements are testimonial in nature where there was no ongoing emergency at the time the statements were made and the police were gathering information for future prosecution purpose. (Id. 261-62, 264, 265). The state rebutted and argued that the witness's statement qualify as excited utterance and are admissible. Id 265-66.

The court inquired whether the witness is going to testify. The state responded they are not sure. Id. 266. The court then asked the state to discuss the Crawford issue and whether Crawford applies. Id. The state argued Crawford does not apply simply because the witness's statements qualify as excited utterance. Id. 266-67. Relying on the state's arguments and Tucker v. State, 884 So.2d 168 (Fla. 2nd DCA 2004), the trial court agreed with the state and concluded that the witness's statement are admissible as substantial evidence because they qualify as

excited utterance. Id. 267. Defense counsel renewed objection, before the non-testifying witness's statements were introduced into evidence, was overruled. Id. 275, 288.

During trial, the state called detective Candace Kernan-Fullen who testified that while she was talking to the victim, Petitioner's daughter started to make statement she thought was important. However, since she did not have a body camera, she borrowed another officer's body camera so she could record Petitioner's daughter's statements because she thought they were important facts. Id 304-305. Consistent to its previous ruling, over defense counsel's hearsay and confrontation clause objections, the court allowed the state to introduce and publish Petitioner's daughter's out-of-court statements. Id. 305-320. Petitioner's daughter did not testify and Petitioner never had an opportunity to cross-examine his daughter.

The jury found the Petitioner guilty as charged in the information on Count 2, with a special finding that Petitioner actually possessed, carried, displayed, used, threatened to use or attempted to use, discharged a firearm and as result thereof caused great bodily harm, and on Count 3, aggravated assault. Subsequently, a bifurcated trial was held on Count 1 possession of firearm by a convicted felon. The jury returned a guilty verdict on this charge as well.

On direct appeal, appellate counsel raised the following claims:

I. The trial court erred in admitting hearsay evidence as an excited utterance.

II. The motion for judgment of acquittal for the count of aggravated assault should have been granted.

However, appellate counsel failed to raise the issue that that the admission of the out-of-court statements of Petitioner's daughter, a non-testifying witness, violates the confrontation clause, even though those out-of-court statements are admissible as excited utterance exception to the hearsay rule.

Petitioner timely filed a Petition For Writ of Habeas Corpus in the state appellate court alleging ineffective assistance of appellate counsel. On November 30, 2023 the state appellate court denied the same and this Petition for Writ of Certiorari ensues.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant certiorari review because Florida hearsay rule as applied is unconstitutional, allowing its agents to circumvent the framers' intent that in every criminal prosecution the accused has the fundamental right to confront his accuser. Further, the issue is important because the Court's inaction will allow states' agents to continue using this and similar tactics indefinitely with complete impunity, especially where no further review is envisioned beyond that of the highest state court.

I. The Florida hearsay Rule, as Applied, Is Unconstitutional

It is well established by this Court's holding in "*Crawford v. Washington*[1] that 'witnesses,' under the Confrontation Clause, are those 'who bear testimony,' and we defined 'testimony' as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' The Sixth Amendment, we concluded, prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Ohio v. Clark*, 576 US 237, 243; 135 S.Ct 2173, 2179; 192 L Ed 2d 306 (2015) (internal quotation marks and alteration omitted).

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the court announced what has come to be known as the "primary purpose" test and explained: "Statements are nontestimonial when made in the course of

---

[1] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Ohio v. Clark*, 576 US 237, 244; 135 S Ct 2173, 2179-80; 192 L Ed 2d 306 (2015).

The court further expounded on the primary purpose test announced in *Davis* emphasizing "that the inquiry must consider 'all of the relevant circumstances.' And reiterated its view in that, when 'the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the Confrontation Clause. At the same time, [the court noted] that 'there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 576 US 237, 244-45; 135 S Ct 2173, 2180; 192 L Ed 2d 306 (2015).

The court concluded that "under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." However, this approach allows States' agents to use nontestifying witness's nontestimonial hearsay statements with the same effect as testimonial hearsay by offering the

former under the guise of some nonhearsay purpose and thereafter used them for the very truth of the matter asserted with complete impunity, even when it falls within no firmly rooted statutory hearsay exception, which frustrates the framers' intent that every accused has the fundamental right to confront his/her accuser.

It is axiomatic that the United States Constitution provides a solid floor of constitutional protections and the states may build a ceiling of protections over that federal floor. Simply put, States may provide more constitutional protections for their citizens than the United States Constitution, *not less*. However, the Florida hearsay rule, as applied, provides less constitutional protections than the United States Constitution by making it easier for its agents to introduce otherwise inadmissible nontestifying witness's nontestimonial hearsay statements for their truth under the guise of some nonhearsay purpose and thereafter use such statements for their truth as substantive evidence with the same effect as testimonial hearsay statements, even when such statements fall within no firmly rooted statutory hearsay exception, which offends the framers' intent that every accused has the fundamental right to confront his accuser and is therefore unconstitutional.

Here, over hearsay and Confrontation Clause objections based on Crawford, the prosecutor sought to introduce the out-of-court statements of Petitioner's daughter into evidence as State's Exhibit 8 and 9. Additionally, defense counsel argued that the admission of those statements would violate Petitioner's right to confront the witness against him because the statements are testimonial in nature

where there was no ongoing emergency at the time the statements were made and the police were gathering information for future prosecution purpose. The state rebutted and argued that the witness's statement qualify as excited utterance and are admissible. The trial court agreed with the prosecution and admitted the nontestifying witness's out-of-court statements as substantial evidence under the Florida Statute §90.803(2), Excited Utterance exception to the Hearsay Rule.

Under these circumstances, the prosecution was able to circumvent the framers' intent, i.e., in every criminal prosecution the accused has the fundamental right to confront his accuser, by relying on Florida Statute §90.803(2), the Excited Utterance exception to the Hearsay Rule, and introduce a nontestifying witness's out-of-court statement as substantial evidence where the Petitioner never had any opportunity to cross-examine the nontestifying witness which violates his due process right under the Confrontation Clause of the United States Constitution. As such as, as applied, the Florida hearsay rule is unconstitutional and this Honorable Court has the opportunity intervene to correct this infirmity otherwise this constitutional infirmity will continue perpetually.

Therefore, as it stands, this Court should seize this unique and timely opportunity and set viable precedent to end this practice which violates the Confrontation Clause of the United States Constitution.

CONCLUSION

Wherefore, based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Frantz Brifil, DC# K64868
Petitioner, Pro se

Date: ~~January 8, 2024~~
FEBRUARY 1, 2024