No. 23-820

In The
Supreme Court of the United States

OHIO,

Petitioner,

v.

WILLIAM JOHNSON,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals, Eighth Appellate District

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

STEVEN L. TAYLOR
Legal Research and Staff Counsel
OHIO PROSECUTING ATTORNEYS ASSOCIATION
196 East State Street, Ste. 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
E-mail: taylor@ohiopa.org
Counsel for Amicus Curiae
Ohio Prosecuting Attorneys Association

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF AMICUS INTEREST[1]

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports Ohio's 88 elected county prosecutors. OPAA's mission is to assist prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and sponsors continuing legal education programs that facilitate access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in this Court accepting review over the question presented. Especially in cases involving domestic violence, it would be highly beneficial to clarify when a victim's statements qualify as "testimonial." It is an oft-recurring question that continues to split lower courts, as discussed in Ohio's petition.

This question in part implicates the prerogatives of Ohio prosecutors. The Ohio appellate court's ruling was fueled in part by its view that it was "abhorrent" and "disturbing" and an "absurdity" that the prosecution would proceed without the live testimony of the victim. *State v. Johnson*, 2023-Ohio-445, 208 N.E.3d

---

[1] No counsel for any party authored any part of this brief, and no monetary contribution was made by any counsel or party intended to fund the preparation or submission of this brief. Because this amicus brief is being filed more than ten days before its due date, it was unnecessary to send to the parties any separate notice of OPAA's intent to file.

949 (8th Dist.), ¶¶ 80-81; see also *State v. Jones*, 2023-Ohio-380, 208 N.E.3d 321, ¶ 151 ("reprehensible").

But the question of whether a statement is "testimonial" is a *threshold* matter as to the right of confrontation. If the out-of-court statement is not testimonial, the Confrontation Clause is inapplicable altogether. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007). The Eighth District's pejoratives regarding the applicability of that right are simply out of place. Courts should be agnostic rather than antagonistic on the threshold question of whether a statement is "testimonial."

The Ohio appellate court also improperly placed the burden on the prosecution to prove that the statements were not testimonial, even though the burden of establishing the facts supporting the applicability of a claimed constitutional right is usually on the proponent of that claim. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 349, 55 N.E.2d 629 (1944). Regardless of whether the constitutional challenge is facial or as-applied, "the invalidity of the challenged law must be demonstrated * * * ." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1127 (2019). When a defendant raises a constitutional objection to evidence that is otherwise admissible under state-law evidence rules, he is raising an as-applied constitutional challenge to the validity of the evidentiary rule(s) that would allow the admission of that evidence, and the threshold burden of demonstrating the "testimonial" nature of the statement should fall on the defendant.

As stated by Justice Scalia, a defendant making a Confrontation objection would have a threshold burden to establish that the out-of-court statement is "testimonial." "Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case without unavailability of the witness and a previous opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence *over* this bar to prove a long-established practice of introducing *specific* kinds of evidence, such as dying declarations, * * * for which cross-examination was not typically necessary." *Ohio v. Clark*, 576 U.S. 237, 253 (2015) (Scalia, J., concurring) (emphasis sic; citation omitted). The right to confrontation does not presumptively apply to every out-of-court statement: "We have never suggested * * * that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case." *Clark*, 576 U.S. at 250-51 (majority). Constitutional rights are important, but it is just as important to get it right when the particular constitutional right does *not* apply as it is to get it right in determining when it does apply. At the threshold stage of making the "testimonial" determination, the appellate court's antagonism aimed at out-of-court statements and directed at prosecutors seeking to use such statements is simply out of place and hinders the proper work of Ohio prosecutors.

"[T]he familiar, standard rule [is] that the prosecution is entitled to prove its case by evidence of its own choice * * * ." *Old Chief v. United States*, 519 U.S.

172, 186 (1997); *United States v. Moore*, 954 F.2d 379, 381 (6th Cir. 1992) ("Sixth Amendment does not * * * require the government to call every witness competent to testify"). "The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial." *United States v. Bahna*, 68 F.3d 19, 22 (2d Cir. 1995). "[I]t seems clear that a prosecutor has no duty to call all the witnesses he has subpoenaed, and may exercise his own judgment concerning the witnesses to be called and the testimony to be presented." *United States v. Harper*, 460 F.2d 705, 706 (5th Cir. 1972).

The Ohio appellate court's pejoratives notwithstanding, it is entirely *consistent* with the constitutional right to confrontation that the victim might not need to testify in a given case and that her nontestimonial statements will be used by the State. The prosecution (and not the appellate court) has the prerogative to choose to proceed without the victim when it can prove its case through other admissible evidence. The appellate court's harsh criticisms are particularly out of place in the context of domestic violence.

SUMMARY OF THE ARGUMENT

OPAA endorses Ohio's petition and its request for clarification of the "testimonial" standard vis-à-vis a domestic-violence victim's initial 911 call following an

attack. The fact pattern is a frequently occurring one, and a split in the lower courts shows that this Court's review would be beneficial to lower courts in addressing the "testimonial" standard.

There were several indicators here that pointed away from a "testimonial" conclusion, but the Ohio appellate court elevated two factors above all others and gave them outsized significance. Because the victim had been able to escape to her parents' home that was 10 minutes away, she was temporarily safe and was speaking in the past tense about past events when she made her excited utterances to the 911 dispatcher. But the victim's location and past-tense statements do not alone negate the existence of an emergency in other respects, as shown by *Michigan v. Bryant*, 562 U.S. 344 (2011), which likewise involved a victim describing a past-tense event at a location that was remote from the original scene. In the present case, there still would have been an immediate need to address the victim's medical condition and an immediate need to restore order at the victim's home and thereby neutralize potential continuing danger(s) attributable to the attacker. Johnson had threatened to kill the victim, and there is no blinking at the fact that he posed a grave danger to police who must intervene quickly to restore order.

ARGUMENT

A DOMESTIC VIOLENCE VICTIM'S USE OF THE PAST TENSE IN A 911 CALL, AND HER ESCAPE FROM THE SCENE OF THE ATTACK, DO NOT DETRACT FROM OTHER INDICATORS SHOWING THAT HER STATEMENTS WERE NON-TESTIMONIAL BECAUSE THERE WAS A CONTINUING EMERGENCY THAT THE VICTIM AND POLICE NEEDED TO ADDRESS.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause bars the admission of "testimonial" out-of-court statements, unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine. *Id*. at 59. The key question is whether the out-of-court statement is testimonial. If the statement is non-testimonial, the right to confrontation is inapplicable altogether.

Since *Crawford* was decided in 2004, the case law has developed a "primary purpose" test in assessing whether the out-of-court statement was made with a primary purpose of creating an out-of-court substitute for trial testimony. Although statements to law enforcement officers can qualify as "testimonial," statements during an ongoing emergency, even to law enforcement officers, will generally not be considered "testimonial."

In *Ohio v. Clark*, 576 U.S. 237 (2015), this Court summarized the line of cases from *Crawford* onward in addressing when a statement will be deemed "testimonial." The *Clark* Court concluded that, "[i]n the end,

the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 576 U.S. at 245, quoting *Bryant*, 562 U.S. at 358.

In *Michigan v. Bryant*, this Court recognized that past-tense statements by the victim could still qualify as non-testimonial because the primary purpose of the statements was to enable police to meet an ongoing emergency. The victim's statements in that case had occurred 25 minutes after the incident and at a location that was remote from the original crime scene. As shown by *Bryant*, the "ongoing emergency" concept "extends beyond an initial victim to a potential threat to the responding police and the public at large." *Bryant*, 562 U.S. at 359. The analysis is focused on the perspective of the parties at the time of the interrogation, not hindsight – "[i]f the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause." *Id*. at 361 n. 8. "[W]hether an ongoing emergency exists is simply one factor – albeit an important factor – that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id*. at 366. The analysis "requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers." *Id*. at 367-68. "Objectively

ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is * * * the approach most consistent with our past holdings." *Id.* at 370.

Despite the all-things-considered approach that is required, the appellate court's assessment of the "emergency" aspects here was remarkably short-sighted. The test does not focus on the risks to the victim alone, and it necessarily must consider the nature of the situation that remained at the victim's home too. "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Bryant*, 562 U.S. at 363.

Per the majority opinion below, the victim told the 911 dispatcher that she had "just left" her home in Parma and that she had been assaulted. She gave the Parma address. The victim stated that her child's father had entered the home and started hitting her, trying to wake her up, and saying that she owed him money. He "didn't care" that the child was sleeping. He began chasing the victim around the house. The victim said that she was running away, and screaming, but that he took her phone and threw it and said if she did not give him the money, he would kill her.

The victim told the dispatcher that she "kinda blacked out with the baby in my arms." She stated that she fell down the steps as she tried to run out of the apartment, but that he would not let her go. The

dispatcher asked her, "Where is he right now?" and "Are the children with you or with him?" She responded that, to her knowledge, he was "still there" but that she had left the apartment with her son and drove to her parents' home in Maple Heights.

The victim disclosed that there was a gun in the house, and the victim described its location. In response to further questioning, the victim provided Johnson's name and date of birth and her name and phone number.

The dispatcher asked the victim when she had left the apartment, and the victim replied that she had left "like 10 minutes ago" and that it takes 10 minutes to get to her parents' house in Maple Heights from her apartment in Parma. The victim said that she was calling from her mother's phone because Johnson had taken her phone and thrown it somewhere in the apartment, and she left without it because she "just had to get out of there."

When the dispatcher asked whether Johnson had hit her at all, the victim said that he had been "choking" her and that he used his knee to "bash [her] head into the wall" when the victim resisted his attempts to "drag [her] up the steps." The victim said that her father had told her that Johnson's nail marks were around her neck. When asked whether she "need[ed] an ambulance," the victim responded that she did not.

The dissenter in the appellate court took note of the "frantic" and "distraught" tone of the 911 call, which was sometimes not fully intelligible because

the victim was "audibly upset" and was gasping and sobbing.

Given the attack on the victim and the presence of a gun in the residence, the officer who responded to the victim's Parma home waited for backup to arrive, and, when they did so, the police conducted a room-by-room "security sweep." Johnson was not present, and the victim later returned to her home.

The non-testimonial aspects predominate in the verbal exchange between the 911 dispatcher and the victim. The dispatcher's questions were basic and by all indications were meant to develop an outline of the nature of the attack in order to assess the seriousness of the situation, clarify any need for medical attention, and gauge the scope of any continuing danger. "Domestic violence comes in widely varying degrees of dangerousness." *Thomas v. Dillard*, 818 F.3d 864, 879 (9th Cir. 2016). Thus, the dispatcher needed to inquire into the nature of the attack, the scope of any injuries, the identity of the attacker and where he might be found, and whether anyone was still present at the Parma residence. "Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). It is a proper part of an emergency that the police would seek "to identify the abuser in order to protect the victim from future attacks." *Clark*, 576 U.S. at 247.

When the victim fled her apartment, the attacker was still present there, and the police would need to investigate the residence and remove Johnson from that location in order to neutralize any continuing danger. He had threatened to kill the victim over a financial problem, and that motive and that intent would not have magically evaporated in the short time frame involved. The "ongoing emergency" concept "extends beyond an initial victim to a potential threat to *the responding police* and the public at large." *Bryant*, 562 U.S. at 359 (emphasis added). As with most 911 calls, this call was seeking police assistance. *Davis v. Washington*, 547 U.S. 813, 827 (2006) ("A 911 call * * * and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance.").

The appellate court quibbled about whether there was any showing that Johnson really was in a position to know the location of the gun and whether the victim knew at the time of her statements that she would later be returning to her apartment. But it is easily inferable that she disclosed the presence of the gun in the home because of the possibility that Johnson would find it and because of the likelihood that police would be going there to neutralize the danger posed by Johnson. She would have wanted the police to be aware of the potential magnitude of the danger, and the presence of a gun naturally increased the potential for such danger.

Moreover, regardless of what the victim subjectively was thinking, a reasonable view of the scenario easily yields the expectation that the very next step to be taken by police would be to enter and secure the original scene. Johnson had threatened to kill the victim, and there was an emergent need for the police to neutralize that danger. The security sweep of the apartment was not some randomly-occurring after-the-fact event; it would have been a highly-expected event that was soon to follow, just as much as it would have been expected in *Bryant* that police would go to the original shooting scene to secure that scene.

The appellate court's analysis reached flights of fancy when it contended that "there is nothing in the record to suggest that Johnson presented any ongoing, immediate physical threat to [T.R.], her son, the police, the public or anyone else at the time of the 911 call." *Johnson*, ¶ 54. In a fit of rage, and apparently drunk, Johnson had threatened to kill the victim, choked her, and kneed her head into a wall when she resisted his efforts to drag her up the stairs. A gun was in the apartment, and he was living there, creating a fair inference that he would know where the gun was stored.

The dangers posed to police responding to domestic-violence situations are fairly well known, and Johnson plainly fit within the category of offenders who pose such dangers. "[M]ore officers are killed or injured on domestic violence calls than on any other type of call." *Thomas*, 818 F.3d at 880 (quoting case law and Senate testimony). "[D]omestic violence calls present a significant risk to police officers' safety * * * ." *Id*. at

880. "[W]e have repeatedly (and correctly) recognized the unique dangers law enforcement officers face when responding to domestic violence calls – including the inherent volatility of a domestic violence scene, the unique dynamics of battered victims seeking to protect the perpetrators of abuse, the high rate of assaults on officers' person, and the likelihood that an abuser may be armed." *Id*. at 892 (Bea, J., concurring and dissenting in part). But the Ohio appellate court here was oblivious to such dangers and to the need for police to go to the original scene to neutralize those dangers in the immediate future and thereby restore order in the victim's home.

In the Fourth Amendment context, but equally applicable here, this Court has recognized that "law enforcement officers may enter a home without a warrant to render *emergency assistance* to an injured occupant *or to protect an occupant from imminent injury*." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (emphasis added). It was plainly reasonable to think that the police would be taking those steps to "prevent further violence." *Id*. at 405. "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties * * * ." *Id*. at 406. Sweeping the scene in order to clear the attacker's presence would be part of the police training, which includes the ability to enter "to determine whether violence (or threat of violence) has just occurred or *is about to (or soon will) occur* * * *." *Georgia v. Randolph*, 547 U.S. 103, 118 (2006) (emphasis added). It was relevant to the duration of the emergency in *Bryant* that

the police had not yet secured the original scene. *Bryant*, 562 U.S. at 374 ("all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting – the shooter's last known location.").

The medical aspects of the situation cannot be overlooked either, since medical issues play a role in the context-dependent inquiry into whether there was an ongoing emergency. *Bryant*, 562 U.S. at 364-65. Even though the victim indicated that she did not need an ambulance, the fact remained that her other statements revealed a serious attack with potential serious medical complications. Johnson had hit and choked her, and she had fallen down some stairs and "kinda blacked out." Johnson also used his knee to bang her head into a wall. The need for medical care could not be ruled out altogether given the scope of this attack, and the questions still needed to be asked to help inform what level of medical care could be required. OPAA wholeheartedly endorses the recognition in Ohio's petition that there can be "short and long-term sequelae for the victim" from strangulation and head trauma that the distraught lay victim might not fully appreciate when she is seeking help in the immediate aftermath of a violent attack. The victim's statement declining ambulance assistance does not negate these kinds of emergent medical aspects that 911 dispatchers and police must still be on the lookout for.

Given all of the circumstances, the verbal exchange was occurring in a highly-informal and fluid

situation. It was unlikely that the victim would have developed any expectation in this setting that her statements would be available for use at trial, as she had plainly suffered a serious attack and the danger at her home potentially continued and her home still needed to be cleared of that potential danger.

It would be mistaken to treat this as only a "private dispute" in which the danger to the victim was concluded. The danger was *not* concluded, as Johnson lived with the victim and therefore knew where she would return and plainly would have had access to that location. This heightened the danger that he would have remained there even after she fled. Knowing the various facts, including Johnson's threat to kill, would help police prepare accordingly to negate that continuing danger.

The immediacy of all of these concerns place this situation in the "emergency" category, and, given the informality of the verbal exchange and other factors, the bottom-line conclusion is that the victim's statements in describing the nature of the attack and identifying the defendant as the attacker were nontestimonial. The defense failed to establish that, in light of all the circumstances, and viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony.

———♦———

CONCLUSION

In light of the foregoing, amicus curiae OPAA respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

STEVEN L. TAYLOR
Legal Research and Staff Counsel
OHIO PROSECUTING ATTORNEYS ASSOCIATION
196 East State Street, Ste. 200
Columbus, Ohio 43215
Phone: 614-221-1266
Fax: 614-221-0753
E-mail: taylor@ohiopa.org
Counsel for Amicus Curiae
Ohio Prosecuting Attorneys Association