IN THE UNITED STATES SUPREME COURT

24-6389

Kalontae Carter, No. _____

Petitioner Carter,

Vs.

Warden, Christopher Larose,

Respondent.

On Petition for a Writ of Certiorari from the Sixth Circuit Court of Appeals

Mr. Kalontae Carter
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Petitioner Kalontae Carter, pro-se.

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QUESTION PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment prohibits the introduction and use of statements made by a non-testifying accomplice which directly implicate the accused, and which are relied on by the prosecution, for the truth of the matter asserted, during its case-in-chief and summation?

II. Are out-of-court statements of a non-testifying accomplice, which directly and intentionally implicate the accused, "testimonial" if the prosecution references and relies on the statement, for the truth of the matter asserted, during its case-in-chief and summation?

JURISDICTIONAL STATEMENT

This case involves an appeal of the June 21, 2021 decision of the United States Court of Appeals for the Sixth Circuit, denying Petitioner Carter's application for a certificate of appealability. On August 10, 2023, this Court returned Petitioner Carter's petition, and provided a sixty-day extension, with direction to make specified changes. *See* Docket. This corrected petition follows and is timely; rendering this Honorable Court's jurisdiction properly invoked pursuant to Title 28 U.S.C. § 2101.(e).

LIST OF PARTIES

The parties to this case are listed in the caption.

TABLE OF AUTHORITIES

Other:

STATEMENT OF THE CASE

This case involves an appeal of a denial of a petition for a writ of habeas corpus, filed pursuant to Title 28 U.S.C. § 2254;[1] stemming from the denial of discretionary review by the Ohio Supreme Court,[2] and affirmance of Petitioner Carter's conviction and sentence on direct appeal.[3]

STATEMENT OF THE FACTS

On April 29, 2013, Kristopher Stuart was shot to death in his house on Elm Street in Youngstown. Upon arriving at the scene, police learned that Petitioner Carter and his uncle, DeJuan Thomas, arrived at separate hospitals with gunshot wounds. On November 14, 2013, a murder complaint was filed against Petitioner Carter in juvenile court. As Petitioner Carter was 17 at the time of the act charged and the juvenile court found probable cause to believe he committed murder, Petitioner Carter was subject to mandatory transfer to the general division of the common pleas court. *See* R.C. 2151.12 (A)(1)(a)(i).

After bind-over, Petitioner Carter was indicted for aggravated murder and aggravated robbery; he was alternatively indicted for murder and felonious assault. Each of the four counts was accompanied by a firearm

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[1] *See* Appendix A, *Carter v. Larose*, No. 4:19CV208, 2020 U.S. Dist. LEXIS 253895 (N.D. Ohio Sep. 30, 2020), *affirmed, Carter v. Larose*, No. 21-3536, (6th Cir. Feb. 3, 2023).
[2] *See* Appendix B, *State v. Carter*, No. 2017-1519, 2018-Ohio-365.
[3] *See* Appendix C, *State v. Carter*, 96 N.E. 3d 1046 (Ohio Ct. App. 2017).

specification. DeJuan Thomas was indicted as a co-defendant on these counts (and on a separate count of having a weapon while under disability). In the same indictment, Laquawn Hopkins, the victim's roommate, was charged with tampering with evidence.

Petitioner Carter elected to exercise his constitutional right to trial by jury. The victim's brother testified that the victim sold drugs, including marijuana and heroin. (Tr. 409, 411, 417). The victim was 26 years old when he died. The victim previously lived with Lorraine McKinnon, who was like a "mother figure" to the victim, but the brother blamed her for the victim's involvement in drug trafficking. (Tr. 413–414, 418). The victim's neighbors also confirmed that the victim was a drug dealer. (Tr. 421–422).

On the evening of April 29, 2013, this neighbor heard arguing at the victim's house and then heard a barrage of gunshots. (Tr. 424–426). She soon heard running on the walkway between their houses, but she remained on the floor for a time. When she eventually looked out her window, she saw Petitioner Carter's roommate "Q" approach his car, go back to the house, return to his car, and drive away. (Tr. 422, 427). She called 911 to report gunfire. A police car drove past but did not stop. (Tr. 428). The neighbor noticed the victim's door was open. (Tr. 428). At this point, Q returned to look for his phone which he found near the driveway.

428). The neighbor noticed the victim's door was open. (Tr. 428). At this point, Q returned to look for his phone which he found near the driveway. (Tr. 429, 439). The neighbor spoke to other neighbors about the situation, and they called 911 to report the gunfire and the open door. She then approached the open door with them and saw the victim's body in the house, at which point they called 911 again. (Tr. 430–431).

An officer testified he responded to a call of gunfire on Elm Street around 9:30 p.m. He drove around the area but did not notice anything unusual. (Tr. 459). He was soon dispatched to the hospital as DeJuan Thomas had arrived in critical condition after being shot. (Tr. 460). Bullet fragments were recovered during surgery and a bag of pills was found on his person. (Tr. 484, 540). While the officer was at the hospital, Petitioner Carter was transferred there from another hospital. (Tr. 461, 492). The Petitioner Carter had a gunshot wound to the left bicep area. From his experience, the officer ascertained this was a "contact shot" or a close-range gunshot wound describing it as: "massive. It was opened up almost like an explosion. It was much larger than a bullet hole. It was, you know, you can put your hand in it. And there were burn marks, you know, around the edges." (Tr. 461–462, 476–477). Petitioner Carter told the officer he was walking on Norwood Street near his home when shots were fired at him

from a passing vehicle. (Tr. 462–462). He soon repeated this story to a detective as well. (Tr. 492). The area near Petitioner Carter's residence was investigated; no blood or casing was found, and residents did not hear gunfire. (Tr. 494).

When police responded to the more specific 911 call around 10:30 p.m., they found the deceased victim on the floor in his Elm Street residence with a silver Smith & Wesson .357 Magnum revolver at his fingertips. (Tr. 445, 447, 536–537, 660). The victim suffered eleven bullet wounds, with the following entry points: three in the chest, two in the back, one in the abdomen, one in the hip, two in the left thigh, one in the right hand, and one grazing the left hand. (Tr. 673–678). The coroner found the victim's wallet containing $445 on his person. (Tr. 710). The victim had opiates in his system. (Tr. 712). The police found a scale, pills, and baggies containing suspected heroin and cocaine at the scene. (Tr. 513, 743).

The cylinder of the six-shot revolver contained one live round and five spent cartridges, all of them .357 Magnum caliber. (Tr. 536, 538, 652, 660–661). The victim's DNA was found on the trigger, and a mixture of the victim's DNA and DNA consistent with Petitioner Carter was found on the handle of the revolver. (Tr. 638). This was believed to be Petitioner Carter's touch DNA, but due to the amount of blood at the scene, it was possible the

DNA on the revolver's handle was from blood. (Tr. 645–646). In the 12–foot by 12–foot room where the victim was lying, there was blood on a mattress; in this vicinity, there was blood spatter on the window blinds and blood and body matter on the ceiling. (Tr. 532). This blood matched Petitioner Carter (as did blood on the driveway and front step). Blood on the sidewalk matched DeJuan Thomas. (Tr. 639).

A bullet jacket recovered from Thomas during surgery had characteristics consistent with the victim's .357 revolver. (Tr. 661–662). Ten fired .40 caliber cartridge cases were collected, mostly from one corner of the room. (Tr. 531). These were not fired from the revolver and were all fired from the same firearm. (Tr. 661). A bullet extracted from the victim's right wrist and three fired bullets recovered from the scene were inconsistent with the revolver and were all .40 S & W caliber or 10 mm auto caliber with the same class of characteristics (but there remained insufficient features to say they were fired from the same firearm). (Tr. 661, 665). A distinct fired bullet core was found lying on the floor near the victim. (Tr. 774). *This bullet core had a different direction of twist* (six lands and grooves with a left twist) than the revolver (five lands and grooves with a right twist) and the four other fired bullets (a rare six-sided polygonal rifling-style with a right twist). (Tr. 662–663, 665–666). From

this, the forensic scientist, testifying as a ballistics expert for the Bureau of Criminal Investigation ("BCI"), concluded at least three different firearms were used. (Tr. 664).

The lead detective visited Petitioner Carter in the emergency room. The Petitioner Carter said the story he told to the other detective and the first-responding officer was false and he wanted to tell the truth. He said his uncle called him, asked him to pick him up, and said they were going to Elm Street for a "bop." (Tr. 727). In the detective's experience, this was slang for a robbery. (Tr. 727, 733). The detective thus stopped the interview and went to his car to retrieve a *Miranda* rights waiver form, which he read to Petitioner Carter and his mother. (Tr. 727).

Petitioner Carter told the detective they knocked on the victim's door and were invited in; he said he sat on the bed while Thomas and the victim argued in the hallway. (Tr. 729). Petitioner Carter told the detective "bop" meant drug deal. (Tr. 733). The detective believed Petitioner Carter changed the meaning after realizing he made a mistake by admitting they had intent to commit a robbery. (Tr. 761). Petitioner Carter told the detective the victim robbed Thomas by demanding Thomas give him what he had. At this point, Petitioner Carter said: he was shot; he ran outside; he heard more shots; he got in the car; his uncle stumbled out; and he dragged

his uncle to the car. Petitioner Carter dropped his uncle off at a hospital guard shack. Petitioner Carter went home, and his sister drove him to a different hospital. (Tr. 730). He told the detective the victim had a "cowboy" gun (not an "automatic" weapon like the detective carried). (Tr. 732). Petitioner Carter's hands were swabbed for gunshot residue just before 1:30 a.m. Weeks later, the test result came back negative. (Tr. 815).

When the detective arrived at work the next day, he had messages from Petitioner Carter saying he needed to speak with the detective immediately. The detective returned to the hospital and re-*Mirandized* Petitioner Carter. (Tr. 734). Petitioner Carter reported it was not the victim who robbed his uncle but was his uncle who robbed the victim. Petitioner Carter said he merely gave his uncle a ride and had no prior knowledge of the robbery. (Tr. 735). The detective asked Petitioner Carter to provide a video-statement at the police department after the hospital released him. (Tr. 735–736).

The Petitioner Carter came to the station with his parents and provided a corresponding video-statement which was played to the jury. (Tr. 747). In the video, Petitioner Carter said he was accompanying his uncle "to hit a bop" which he said was a "drug transaction." He saw a man with a child in a room on the opposite side of the hall from the room he

entered. Petitioner Carter sat on the bed while his uncle and the victim talked in the hallway. He heard his uncle order the victim to "give the shit up," and the victim responded, "I ain't got nothin'." He said his uncle and the victim started wrestling and ended up in the room where Petitioner Carter was sitting on the bed. The Petitioner Carter said the shot that hit him knocked him off the bed into the corner. He claimed he had no gun, and they were still wrestling when he fled the room during which time he heard more shots.

At the time Petitioner Carter provided these statements, it was believed DeJuan Thomas was dying. (Tr. 749).

After Thomas recovered, Petitioner Carter changed his story and said there was no robbery. (Tr. 750–751). (DeJuan Thomas subsequently died before trial in a separate shooting incident). As for the person Petitioner Carter saw in a room with a child, the detective testified Laquawn Hopkins pled guilty to tampering with evidence. (Tr. 740, 782). It was elicited that Hopkins hid with his child in the backyard during the shooting, but he thereafter entered his room to remove photographs so he could not be connected with the situation. (Tr. 741).

The detective believed the evidence suggested the collection of shell casings found in the corner were consistent with a gun being fired from

Petitioner Carter's position in the room. He noted the evidence as to the testimony about a third firearm producing a bullet core; the direction of cartridge ejection from a semi-automatic firearm; the blood evidence belonging to Petitioner Carter on the mattress, ceiling, and blinds; and Petitioner Carter's admitted position in the room (which we note included Petitioner Carter's statement he was knocked into a corner upon being shot). (Tr. 738, 774, 794–795). The detective said he filed the juvenile complaint against Petitioner Carter after speaking to an inmate.

Jonathan Queener testified he was in the county jail with long-time friend DeJuan Thomas when Thomas said: he and Petitioner Carter went to rob the victim; he told Petitioner Carter they were going to get money and try to get drugs; the victim pulled out a .357; they exchanged fire; and Petitioner Carter dropped him off at the hospital. (Tr. 564–565, 570). Queener acknowledged he benefited from a plea deal in return for his agreement to testify truthfully; his aggravated burglary charge was reduced to burglary, and the state recommended community control. (Tr. 561–562).

Loraine McKinnon testified the victim lived with her when he was in his teens and was like a son to her. (Tr. 593, 596, 604). She also knew Petitioner Carter because he would visit his female cousin who stayed at her house; she said she loved Petitioner Carter (as she loved the victim). (Tr.

591, 599). This witness testified: Petitioner Carter apologized to her after the shooting; he told her he did not know they were going to "Kris's" house; and he explained his uncle called him to accompany him on an "easy lick," which she defined as a street term meaning to "rob someone." (Tr. 597–598). She explained she did not call the police upon learning this because Petitioner Carter was a child and his uncle was to blame; she voiced her story to a prosecutor who called her while preparing for trial. (Tr. 615). She noted the victim's guns had been stolen a couple weeks prior to his death. (Tr. 602).

The jury found Petitioner Carter guilty of the four counts with the accompanying firearm specifications. Petitioner Carter was sentenced to twenty years to life for aggravated murder plus three years for the firearm specification. The other charges merged. Petitioner Carter filed a timely notice of appeal from the December 22, 2015, sentencing entry.

Relevant here, during direct appeal proceedings, the Petitioner Carter raised the following issue: Whether the Trial Court erred in permitting a jailhouse snitch to testify to an alleged out-of-court statement made by a deceased co-defendant in the trial of Defendant–Appellant as it constituted inadmissible hearsay and violated his confrontation rights?

The court of appeals answered the question in the negative reasoning:

[T]he admission of Dewan Thomas's statement to an old friend while both were incarcerated which incriminated himself and Appellant in a robbery and homicide would not implicate the confrontation clause as the primary purpose of the statement was unrelated to creating evidence for prosecution. Pertinent circumstances include the fact the statement was not made to law enforcement or other authority and the statement was made to an old friend while both were incarcerated. Ohio confrontation clause law does not lead to a different conclusion."

State v. Carter, 96 N.E.3d 1046, 1061 (Ohio Ct. App. 2017).

The Ohio Supreme Court declined review. *Carter, supra*, 2018-Ohio-365.

The Sixth Circuit Court of Appeals affirmed reasoning:

Applying Supreme Court precedent, the Ohio Court of Appeals determined that Thomas's statement was non-testimonial. The court concluded that Thomas's statement to his old friend and cellmate, rather than to law enforcement, was not made for the primary purpose of creating evidence for a later prosecution. *Carter*, 96 N.E.3d at 1061362. This conclusion was reasonable. Thomas made the statement in an informal setting to a friend, rather than in the context of a police interrogation. *See Clark*, 576 U.S. at 249; *Michigan v. Bryant*, 562 U.S. 344, 366, 377 (2011). Moreover, the Supreme Court has noted that statements made unwittingly to a government informant or from one prisoner to another can be admissible. *See Davis*, 547 U.S. at 825 (*citing Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987) and *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970)). Carter provides no support for his contention that Thomas made his statement with the primary purpose of creating evidence. Carter essentially asks this court to hold that virtually all hearsay statements that affect a central issue in a criminal prosecution should be treated as testimonial. But neither the Supreme Court nor this court has ever held that the Confrontation Clause prohibits the introduction of such statements. Carter also cites several cases in which an unavailable confidential informant's statements to law enforcement were considered testimonial, yet that factually distinct scenario shows why those statements were testimonial and the one here was not. In short, the Ohio Court of

Appeals' decision was reasonable, and Carter is not entitled to habeas relief."

See Carter v. Larose, No. 21-3536, (6th Cir. Feb. 3, 2023).

This timely petition for a writ of certiorari follows.

REASONS WHY THIS COURT SHOULD GRANT THIS PETITION

This case presents this Court with the much-needed opportunity to expound upon and clarify the definition of the term "testimonial," as used in Confrontation Clause jurisprudence, in a context likely to recur until this question is solved.

On no less than two occasions, this Court has recognized the need to determine whether statements made to non-police officials can qualify as "testimonial," for Confrontation Clause purposes; and on each occasion, this Court reserved ruling because the case before it did not require a ruling on the issue. *See Michigan v. Bryant*, 562 U.S. 344, 359 n.3 (2011); *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006).

Crawford v. Washington, 541 U.S. 36 (2004), establishes that Confrontation Clause precepts are abridged when prosecutors introduce into evidence statements by a non-testifying accomplice, which directly implicate the accused, reference and rely on those statements during summation, secure conviction under use of those statements, and then, on

appeal, secure affirmance of conviction on the theory that the statements were "non-testimonial" because they were not made under circumstances which reflected knowledge, by the declarant, that the statements would be later used at trial. Under *Crawford, supra*, and its offspring, what should also matter is whether a prosecutor knowingly, intentionally, and purposefully introduced and used the statement at trial for the truth of the matter asserted, during its case in chief or summation, and whether the instructions of the trial court allowed the jury to consider the substance and import of the statement unlimited.

This happened here.

A jailhouse informant told police officials that a deceased co-defendant of Petitioner Carter's told him, before he died, that Petitioner Carter did commit the crimes charged, and that he engaged the venture knowingly. Petitioner Carter objected to admission of these incriminating statements by his deceased co-defendant under state hearsay rules and federal Confrontation Clause grounds. Petitioner Carter's defense at trial was that the deceased co-defendant was the architect and perpetrator, and that he was at the scene of the incident unknowingly.

In the lower courts, the statement was admitted and upheld under the theory that no reasonable person in the deceased co-defendant's position

would have made a statement which incriminated himself among others, absent a belief by the declarant the statement true. *See* Ohio Evid. R. 804(b)(3).[4] Petitioner Carter submits that, in that same vein, it is reasonable to conclude that any person who makes such a statement knew or should have known that the statement could or would be used in a court of competent jurisdiction if believed by the person who heard it or if it was relayed to others. *Compare generally*, Title 18 U.S.C. 4 (criminalizing failures to report a cognizable offense); *accord* O.R.C. Ann. § 2921.22 (A)(1) (making it unlawful for and person, knowing that a felony has been or is being committed, to knowingly fail to report such information to law enforcement authorities).

Prosecutors cannot have it both ways: A statement introduced under the theory that its self-incriminating character renders it "reliable" because no reasonable person would have made the statement unless that person believed it to be true, supports the conclusion that, by virtue of Title 18 U.S.C. § 4 and O.R.C. 2921.22, and the presumption that citizens are cognizant of the law, no person in the declarant's position could reasonably

[4] *Compare also, United States v. Helbrans*, 2021 WL 4778525, 2021 U.S. Dist. LEXIS 196729, *78 (S.D.N.Y. Oct. 12, 2021) ("[A] statement is sufficiently against the declarant's penal interest if a reasonable person in the declarant's position would have made the statement only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to . . . expose the declarant to civil or criminal liability. ... This rule 'is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.'") (*quoting Williamson v. United States*, 512 U.S. 594, 599 (1994)).

would be used in a criminal trial scheduled to follow.

Comparable is *Ohio v. Clark*, 135 S. Ct. 2173 (2015). In that case, a nurse who had a duty to report crimes examined and questioned a three-year-old regarding suspicions of child abuse. The examination and questioning of the child by the nurse resulted in a claim by the child that the defendant was the abuser; resulting in indictment and conviction based on the state's introduction and use of the out-of-court statements of the child which implicated the defendant. The Ohio Supreme Court reversed the defendant's conviction; reasoning that because the nurse had a duty to report crimes, her interview of the child produced statements which were "testimonial." Reasoning that a three-year-old child, in the circumstance presented, did not and could not appreciate the fact that any statements he made could later be used in a criminal trial which resulted, this Court reversed. In reversing, this Court clarified that the primary purpose test of *Bryant, supra*, focuses on the understanding of the declarant. If the declarant knew, or should have known, that statements made could or would be used in criminal proceedings, the statements were "testimonial."

Applied here, this holding requires reversal. The person who made the statement at issue, (Petitioner Carter's deceased co-defendant), and the

person who the declarant was talking to, (the jailhouse informant), both knew that O.R.C. § 2921.22(A) required the jailhouse informant to report the information learned to police officials.

Although conversations had between private citizens do not normally produce statements which are "testimonial," if enacted law absolutely requires that the party listening report information relayed which constitutes proof of a crime, statements which are "testimonial" have been produced. Because the content and requirements of section 2921.22(A) are presumed to be understood by all citizens alike, both parties knew and should have known that any statements relayed which established proof of a crime could and would be relayed to pertinent authorities, and that the statement could be later used at trial.

CONCLUSION

The Confrontation Clause prohibits the prosecution from introducing testimonial hearsay—*e.g.*, "testimonial" statements by a non-testifying declarant that are admitted for the truth of the matter asserted—unless the declarant is unavailable to testify, and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53–57, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

sentence; requiring this Court to grant this petition, vacate the lower court judgment, and remand this case for a decision not inconsistent with the holding established in *Crawford, supra*, clarified and expounded upon by its offspring.

RELIEF SOUGHT

Petitioner Carter moves this Honorable Court for an order granting, vacating, and remanding his cause for reconsideration and a decision not inconsistent with the following holding of *Crawford, supra*:

> The Confrontation Clause prohibits the prosecution from introducing testimonial hearsay—*e.g.*, "testimonial" statements by a non-testifying declarant that are admitted for the truth of the matter asserted—unless the declarant is unavailable to testify, and the defendant had a prior opportunity to cross-examine the declarant."

See Crawford, supra, at 53-57.

Kalonte Carter