No. 21-

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

MARK D. JENSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Before Julie Jensen died, she told a police officer acquaintance that she was not suicidal and that if she died, the police should look at her husband, Mark Jensen, as a suspect. The Wisconsin Supreme Court held that these statements were testimonial hearsay whose admission violated Jensen's confrontation rights at his trial for killing Julie.

The questions presented are:

1. Can a person's statement expressing fear about a possible future crime be testimonial under the Sixth Amendment's Confrontation Clause?

2. When a person reports ongoing psychological domestic abuse and expresses fear about future physical harm, is the person's statement aimed at ending an ongoing emergency such that it is non-testimonial?

RELATED PROCEEDINGS

State v. Jensen, No. 2004AP2481-CR, Wisconsin Supreme Court. Judgment entered February 23, 2007.

State v. Jensen, No. 2002-CF-314, Kenosha County Circuit Court. Judgment of conviction entered February 27, 2008.

State v. Jensen, No. 2009AP898-CR, Wisconsin Court of Appeals. Judgment entered December 29, 2010.

State v. Jensen, No. 2009AP898-CR, Wisconsin Supreme Court. Order entered June 15, 2011.

Jensen v. Schwochert, No. 11-C-803, U.S. District Court for the Eastern District of Wisconsin. Judgment entered December 18, 2013, and January 23, 2014.

Jensen v. Clements, No. 14-1380, U.S. Court of Appeals for the Seventh Circuit. Judgment entered September 8, 2015. Rehearing denied October 9, 2015.

State v. Jensen, No. 02-CF-314, Kenosha County Circuit Court. Judgment of conviction entered September 8, 2017.

Jensen v. Clements, No. 11-C-803, U.S. District Court for the Eastern District of Wisconsin. Order entered November 27, 2017.

Jensen v. Pollard, No. 17-3639, U.S. Court of Appeals for the Seventh Circuit. Judgment entered May 15, 2019. Rehearing and rehearing en banc denied November 6, 2019.

Jensen v. Pollard, No. 19-7603, U.S. Supreme Court. Certiorari denied June 29, 2020.

State v. Jensen, No. 2018AP1952-CR, Wisconsin Court of Appeals. Judgment entered February 26, 2020.

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Direct challenge to original conviction: The opinion of the Wisconsin Court of Appeals affirming Jensen's original conviction is reported as *State v. Jensen*, 2011 WI App. 3, 331 Wis. 2d 440, 794 N.W.2d 482 (*Jensen II*). (Pet-App. 56–70.)

Interlocutory appeal of evidentiary rulings: The opinion of the Wisconsin Supreme Court is reported as *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518 (*Jensen I*). (Pet-App. 71–90.)

JURISDICTION

The Wisconsin Supreme Court entered judgment on March 18, 2021. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

INTRODUCTION

Julie Jensen died from poisoning. A jury found her husband, Mark Jensen, guilty of her homicide. The evidence at Jensen's month-long trial included Julie's handwritten letter and voicemails to a police officer, in which Julie expressed her fear that Jensen was planning to kill her.

The Wisconsin Supreme Court held that these statements by Julie were "testimonial" hearsay under the Sixth Amendment's Confrontation Clause. The court adopted a broad test that would deem any statement testimonial if it could reasonably be anticipated to be used in an investigation or prosecution of a crime. The court reasoned that Julie's voicemails and letter were testimonial because they implicated Jensen in a crime, even though Jensen had not yet committed the crime when Julie made those statements. The court further reasoned that Julie's voicemails were not made during an ongoing emergency, even though she said in a voicemail that she thought her husband was going to kill her.

That analysis conflicts with decisions of other courts and stands in significant tension with this Court's precedent. Several courts have held that statements about possible future crimes are almost certainly never testimonial, in direct conflict with the Wisconsin Supreme Court's decision. Courts have also recognized that the expansive definition of "testimonial," which the Wisconsin Supreme Court adopted and applied in Jensen's case, is overly broad and inconsistent with this Court's precedent. Finally, the Wisconsin Supreme Court took an overly narrow view of what constitutes an

ongoing emergency, ignoring that Julie made her statements at issue while suffering ongoing psychological abuse. Whether those statements are testimonial is an important issue of constitutional law involving multiple splits of authority.

STATEMENT OF THE CASE

A. The murder of Julie, interlocutory appeal, and trial

Jensen's wife, Julie, died in 1998. (Pet-App. 56, ¶ 3.) The doctor who performed the autopsy on Julie believed her cause of death was "asphyxia by smothering." (Pet-App. 62, ¶ 37.) A different doctor, one of Kenosha County's medical examiners, believed that Julie's cause of death was ethylene glycol (antifreeze) poisoning "with probable terminal asphyxia," "an indicator for homicide rather than suicide." (Pet-App. 62, ¶ 37.) In 2002, the State charged Jensen with first-degree intentional homicide for killing Julie. (Pet-App. 56, ¶ 3.)

Weeks before Julie died, she told her son's teacher (Theresa DeFazio), her neighbor (Tadeusz Wojt), and Police Officer Ron Kosman that she feared that Jensen was trying to poison her and make her death look like a suicide. (Pet-App. 57, 62–65, 88, ¶¶ 5–7, 40–67, 72.) She also said that she was not suicidal. (Pet-App. 65, ¶ 67.) About three weeks before Julie died, she "was upset and scared" and told Wojt that "she feared that Jensen was trying to poison her or inject her with something because Jensen was trying to get her to drink wine and she found syringes in a drawer." (Pet-App. 57, ¶ 5.) "Julie also allegedly told [Wojt] that she did not think she would make it through one particular weekend because she had found suspicious notes written by

her husband and computer pages about poisoning." (Pet-App. 57, ¶ 5.) About two weeks before Julie died, she told Wojt "that Jensen was 'chasing her' with a glass of wine trying to get her to drink it, that Jensen kept following her with the wine, would put it next to her and this went on until three in the morning." (Pet-App. 63, ¶ 46.) "Julie told Wojt that the same night she also saw their nightstand drawer left cracked open and inside the drawer she could see syringes." (Pet-App. 63, ¶ 46.) Julie made similar statements to DeFazio. (Pet-App. 63, ¶ 43.)

Julie gave an envelope to her neighbor, Wojt, shortly before her death and asked him to give it to the police if anything happened to her. (Pet-App. 57, ¶ 5.) The envelope held a letter that said, among other things, "if anything happens to me, [Jensen] would be my first suspect." (Pet-App. 57, ¶ 7.) It also said, "I would never take my life because of my kids—they are everything to me! . . . I will not leave [my two sons]." (Pet-App. 57, ¶ 7.) The letter was addressed to Officer Kosman and a detective. (Pet-App. 57, ¶ 7.) Wojt gave the sealed envelope to police after Julie died. (Pet-App. 57, ¶ 7.)

Officer Kosman had interacted with Julie many times over the past several years. Julie contacted Kosman 40 to 50 times since 1992 or 1993. (R. 834:42, 51–52.)[1] These contacts primarily involved her reporting harassing telephone calls and pornographic photos left at Jensen and Julie's residence that Julie thought were

[1] Citations to "R." refer to the record in Kenosha County Circuit Court case number 2002-CF-314.

threatening to their relationship. (R. 834:52; 909:51–57.) Kosman said that he responded to the residence for these calls about 30 times. (R. 909:53.) Through the course of these contacts, Julie and Kosman's relationship developed a social aspect, as well. Kosman would stop by the Jensen home as many as ten times per year to check on Julie and "see if things had quieted down." (Dkt. 28-4:11.)[2]

In the weeks before the murder, Julie left two voicemails for Kosman while Kosman was out of town, "stating that if she were found dead, Jensen should be Kosman's 'first suspect.'" (Pet-App. 1, ¶ 2.) In the first voicemail, Julie asked Kosman "to call [her] as soon as possible." (Pet-App. 65, ¶ 71 (alteration in original).) In the second voicemail, Julie, who sounded "confused" and "a little afraid," said "that she thought Jensen was trying to kill her." (Pet-App. 72, ¶ 6; Dkt. 28-3:42.)

When Kosman returned from his trip, he met with Julie. (Dkt. 28-3:44.) During this meeting, Julie was "confused," "scared," and "somewhat emotional." (Dkt. 28-3:45.) She told Kosman that Jensen had been acting strangely, was being very secretive, and was complaining that Julie was not being romantic enough. (Dkt. 28-3:44.) Julie expressed concern to Kosman over several suspicious things she had noticed, including a "shopping list" that listed aspirin, razor blades, and syringes—items that neither Julie nor Jensen would usually need. (Dkt. 28-:49.) Julie said that

[2] Citations to "Dkt." refer to the docket of the U.S. District Court for the Eastern District of Wisconsin in case number 11-C-803.

if she died, Jensen would be her first suspect and she would not have killed herself. (Pet-App. 57, ¶ 6.)

After being charged with Julie's death, Jensen moved the trial court to exclude Julie's letter and her statements to Kosman to protect his rights under the Sixth Amendment's Confrontation Clause. (Pet-App. 57, ¶ 9.) The court initially denied the motion, but after this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), it reconsidered and ruled that the evidence was testimonial hearsay and inadmissible. (Pet-App. 57–58, ¶ 10.) The court also denied the State's request to admit this evidence under the forfeiture-by-wrongdoing doctrine. (Pet-App. 58, ¶ 10.)

Both parties took an interlocutory appeal, and the case went to the Wisconsin Supreme Court. *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518 (*Jensen I*). (Pet-App. 71–90.) The court held that Julie's letter and voicemails to Kosman were testimonial. (Pet-App. 58, ¶¶ 28–30.)[3]

In doing so, the Wisconsin Supreme Court adopted a "broad" definition of "testimonial." (Pet-App. 75, ¶ 24.) *Crawford* discussed three proposed definitions of "testimonial" without specifically adopting one. *Crawford*, 541 U.S. at 51–52. The Wisconsin Supreme Court analyzed Julie's letter and voicemails under *Crawford's* third formulation, which asks whether the circumstances "would lead an objective witness reasonably to believe that the statement would be available for use at a later

[3] The court held that Julie's statements to her neighbor and son's teacher were non-testimonial.

trial." (Pet-App. 75, ¶ 20 (citation omitted).) Julie's letter was testimonial, the court said, because "a reasonable person in Julie's position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial," and she intended it "to be used to further investigate or aid in prosecution in the event of her death." (Pet-App. 76, ¶ 27.) The court held that the voicemail was testimonial because Julie "sought to relay information in order to further the investigation of Jensen's activities." (Pet-App. 76, ¶ 30.) The court rejected the State's argument that Julie's letter and voicemails were non-testimonial because they referred to a possible future crime. Instead, the court held that "it does not matter if a crime has already been committed or not." (Pet-App. 76, ¶ 28.) The court did not address whether Julie's in-person statements to Kosman were testimonial.

The Wisconsin Supreme Court then addressed the forfeiture-by-wrongdoing doctrine. (Pet-App. 77–81, ¶¶ 35–37.) It adopted a "broad" version of the doctrine under which a defendant forfeits his right to confront a witness if he is the cause of the witness's unavailability for cross-examination. (Pet-App. 81, ¶ 57.) It remanded to allow the trial court to address whether to admit Julie's letter and voicemails to Kosman on that basis. (Pet-App. 81, ¶ 58.)

On remand, the trial court found that Jensen had forfeited his right to confront Julie by killing her, so it admitted into evidence her letter and statements to Kosman. (Pet-App. 58 ¶ 14.) After a trial that lasted more than 30 days, a jury convicted Jensen

of first-degree intentional homicide for killing Julie. (Pet-App. 59 ¶ 19.) The trial court sentenced him to life in prison without the possibility of release. (*See* Pet-App. 28.)

B. Direct appeal from conviction

Shortly after Jensen's conviction, this Court decided *Giles v. California*, 554 U.S. 353 (2008), addressing the forfeiture-by-wrongdoing exception to the Confrontation Clause. (Pet-App. 59, ¶ 20.) This Court held that, for the exception to apply, a defendant must have made the witness unavailable by "conduct *designed* to prevent a witness from testifying." *Giles*, 554 U.S. at 365.

Jensen then appealed his conviction. He argued that *Giles*'s narrow interpretation of the forfeiture doctrine overruled the Wisconsin Supreme Court's broad interpretation that the trial court applied when admitting Julie's letter and statements. (Pet-App. 59, ¶ 20.) The Wisconsin Court of Appeals affirmed Jensen's conviction. *State v. Jensen*, 2011 WI App. 3, 331 Wis. 2d 440, 794 N.W.2d 482 (*Jensen II*). (Pet-App. 56–70.) It assumed without deciding that *Giles* barred the admission of the evidence and held that any error was harmless. (Pet-App. 61–65, ¶¶ 35–73.) In so holding, the court determined that it was bound by the Wisconsin Supreme Court's prior ruling that Julie's letter and voicemails to Kosman were testimonial. (Pet-App. 60, ¶ 27.) The Wisconsin Supreme Court denied Jensen's petition for review.

C. Federal habeas corpus proceedings

After his state-court appeal, Jensen filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Wisconsin. (Dkt. 1.) He argued that the state court of appeals had unreasonably resolved his confrontation claim. (Dkt. 1:15–17) *See also Jensen v. Schwochert*, No. 11-C-0803, 2013 WL 6708767, at *6 (E.D. Wis. Dec. 18, 2013) (*Schwochert).* The State did not challenge the Wisconsin Supreme Court's holding in *Jensen I* that Julie's statements to Detective Kosman were testimonial. *Schwochert,* 2013 WL 6708767, at *6.

The court granted Jensen's federal habeas petition in 2013. *Id*. at *17. The court held that the Wisconsin Court of Appeals had unreasonably concluded that the letter's and statements' admission into evidence was harmless error. *Id*. at *9–16. The court did not address whether the letter and statements were testimonial, noting instead that "the parties do not dispute" the issue. *Id*. at *6.

The court ordered that Jensen be "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id*. at *17.

The State appealed, and a divided panel of the Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892, 892 (7th Cir. 2015) (*Clements*). The majority agreed with the district court's holding that the admission of the letter and the statements was not harmless. *Id*. at 901–08. It did not address whether the evidence was testimonial. *Id*. at 899–908. The dissent concluded that the Wisconsin Court of

Appeals' harmless-error decision was a reasonable application of federal law. *Id.* at 908–13. The Seventh Circuit denied rehearing in October 2015.

D. Reinstated conviction

In December 2015, the Kenosha County Circuit Court vacated Jensen's judgment of conviction. (Dkt. 101:1–2, 5; *see also* Pet-App. 50.) The State said it intended to retry Jensen. (Dkt. 101:5.)

Jensen moved to exclude Julie's statements and letter at a new trial. (Dkt. 94-3:97; 101:5.) The parties extensively briefed and orally argued the motion. (Dkt. 101:5 & n.1.) The State argued that the Wisconsin Supreme Court's 2007 holding that the statements and letter were testimonial was no longer valid because this Court had narrowed the definition of "testimonial" since that decision. (Dkt. 94-5:50.) The State argued the statements were no longer testimonial under current law. (Dkt. 94-5:50.) The State further argued that, under Wisconsin's law-of-the-case doctrine, the trial court should apply the current law rather than following the state supreme court's 2007 decision. (Dkt. 94-5:74–77.)

The trial court determined that Julie's statements and letter were not testimonial and thus admissible. (Dkt. 94-9:68–71; 101:5.) Specifically, it concluded that under *Ohio v. Clark*, 576 U.S. 237 (2015), and *Michigan v. Bryant*, 562 U.S. 344 (2011)—both issued since the Wisconsin Supreme Court's 2007 decision—the letter and statements were no longer testimonial. (Dkt. 94-9:70–71; 101:5.) The trial court also addressed whether the law-of the-case doctrine required it to follow the state

appellate courts' or federal courts' decisions. (Dkt. 94-9:69–70.) It determined that, of these courts, only the Wisconsin Supreme Court had addressed whether the statements and letter were testimonial. (Dkt. 94-9:69–70.) And, the court concluded, it was able to revisit that decision under the law-of-the-case doctrine and apply current law. (Dkt. 94-9:69–70.)

The State moved the trial court to reinstate Jensen's judgment of conviction. (Dkt. 101:6.)[4] The trial court granted that motion. (Dkt. 94-11:4–5; 101:6–7.) The court reasoned that, because of its decision to admit Julie's letter and statements, "the evidence in a new trial would be materially the same as in the first trial." (Dkt. 94-11:4; 101:6–7.) It further explained that "it doesn't make a whole lot of sense to me as far as judicial economy to have a new trial on the same evidence as in the first trial." (Dkt. 94-11:5.) The trial court entered a judgment of conviction sentencing Jensen to life imprisonment without the possibility of release. (Dkt. 94-11:11–12.)[5]

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[4] The State also filed a motion asking the federal district court to clarify whether reinstating Jensen's conviction without a new trial would violate the court's order granting habeas relief. (Dkt. 86:5; 101:5–6.) The court concluded that "[t]he State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order." (Dkt. 90:5.) But the court declined to say what it would do if the state trial court reinstated Jensen's conviction, concluding that such a ruling would be an advisory opinion. (Dkt. 90:6.)

[5] Jensen returned to federal district court, arguing that the trial court violated the habeas order by reinstating the judgment of conviction without holding a new jury trial. (Dkt. 93; 101:2, 7.) The district court denied Jensen's request to enforce the writ of habeas corpus, reasoning that the habeas order did not require a new trial but only required the State to initiate proceedings to retry him. (Dkt. 101:1, 7–16.) Jensen appealed the district court's order to the Seventh Circuit, which unanimously

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E. Direct appeal from reinstated conviction

Jensen appealed his reinstated conviction to the Wisconsin Court of Appeals. *See State v. Jensen*, No. 2018AP1952-CR (Wis. Ct. App. Feb. 26, 2020). (Pet-App. 14–26.) Jensen argued that the trial court had violated the conditional habeas writ by reinstating his judgment of conviction without a new trial. (Pet-App. 15, 23.) He also claimed that the trial court was bound by Wisconsin's law-of-the-case doctrine to follow the prior decisions of the federal courts and Wisconsin's appellate courts and deem Julie's letter and statements testimonial. (Pet-App. 15, 23.) Jensen further argued that the trial court had erred by finding the letter and statements non-testimonial. (Pet-App. 15, 23.)

The Wisconsin Court of Appeals reversed the trial court on February 26, 2020. (Pet-App. 23–25.) Sidestepping most of the issues Jensen raised, it concluded that it and the trial court were bound to follow the Wisconsin Supreme Court's 2007 *Jensen I* decision holding that Julie's statements and letter to Officer Kosman were testimonial. (Pet-App. 23–25.) The court determined that the trial court had thus erred by reinstating the judgment of conviction based on inadmissible evidence and remanded to the trial court for a new trial. (Pet-App. 23–25.)

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affirmed, with one judge concurring. *Jensen v. Pollard*, 924 F.3d 451 (7th Cir. 2019). Jensen moved for rehearing en banc, which the court denied. Jensen then filed a petition for a writ of certiorari, which this Court denied. *Jensen v. Pollard*, 141 S. Ct. 165 (2020).

The State filed a petition for review, which the Wisconsin Supreme Court granted. (Pet-App. 3.) The court affirmed. *State v. Jensen*, 2021 WI 27, 396 Wis. 2d 196, 957 N.W.2d 244 (*Jensen III*). (Pet-App. 1–13.) It held that this Court's decisions in *Clark* and *Bryant* did not affect the Confrontation Clause analysis "in any way that undermines our reasoning in *Jensen I*." (Pet-App. 4, ¶ 17.) The court concluded that its "decision in *Jensen I* that Julie's statements constituted testimonial hearsay established the law of the case. Subsequent developments in the law on testimonial hearsay are not contrary to *Jensen I*." (Pet-App. 7, ¶ 36.) It thus affirmed the court of appeals' decision. (Pet-App. 7, ¶ 36.)

Justice Jill Karofsky, joined by now-Chief Justice Annette Ziegler, concurred. Justice Karofsky argued that the majority opinion in *Jensen I* had failed to recognize the domestic-abuse context in which Julie made her statements at issue. (Pet-App. 7–9, ¶¶ 37–38, 48.) She agreed that the law-of-the-case doctrine barred the court from reconsidering *Jensen I*, but she thought that the court in *Jensen I* would have "possibly reached a different conclusion" had it considered the context in which Julie made her statements. (Pet-App. 12, ¶ 58.)

REASONS FOR GRANTING THE PETITION

In *Crawford*, this Court held that the Sixth Amendment's Confrontation Clause "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 U.S. 237, 243 (2015) (quoting *Crawford v.*

Washington, 541 U.S. 36, 54 (2004)). The Confrontation Clause does not bar the introduction of a statement "unless its primary purpose was testimonial." *Id.* at 245. "But . . . *Crawford* did not offer an exhaustive definition of 'testimonial' statements." *Id.* at 243.

In *Jensen I*, the Wisconsin Supreme Court adopted a broad view of which statements are testimonial for Confrontation Clause purposes. Applying this broad test, the court held that Julie's voicemails and letter were testimonial because they accused Jensen of planning a crime that he had not yet committed. The court further reasoned that Julie's statements were testimonial because she did not make them during an ongoing emergency.

The reasoning in *Jensen I* conflicts with precedent from this Court and other courts in two main respects. First, several courts have held that victims' statements regarding possible future crimes by the defendants were non-testimonial, in conflict with *Jensen I*. Those other courts have it right: this Court's decisions deem a statement testimonial when it is directed at establishing *past* events, not events that have not yet occurred and which may never occur. Second, *Jensen I* applied an unduly narrow view of what constitutes an ongoing emergency. A woman such as Julie Jensen, who complains to police about ongoing domestic abuse that threatens her life, is facing an ongoing emergency. How courts should treat statements by victims facing ongoing domestic abuse is an important issue this Court should resolve.

I. CERTIORARI IS WARRANTED ON THE QUESTION WHETHER A STATEMENT ABOUT A POSSIBLE FUTURE CRIME CAN BE TESTIMONIAL.

The decision below[6] rejected the proposition that statements about possible future crimes are non-testimonial. Other courts, however, have held the opposite. This Court should grant certiorari to resolve this split of authority.

A. The lower courts are divided on this issue.

In *Jensen I*, "the State insist[ed] that [Julie's] letter is nontestimonial because it was created before any crime had been committed so there was no expectation that the letter would potentially be available for use at a later trial." (Pet-App. 76, ¶ 28.) The Wisconsin Supreme Court rejected that argument, reasoning that "under the standard we adopt here it does not matter if a crime has already been committed or not." (Pet-App. 76, ¶ 28.)

Other courts, though, have held that "in the case of a crime committed over a short period of time, a statement . . . made before the crime is committed . . . almost certainly is not testimonial." *Bray v. Commonwealth*, 177 S.W.3d 741, 746 (Ky. 2005) (quoting *United States v. Cromer*, 389 F.3d 662, 673 (6th Cir. 2004), in turn quoting Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1040–43 (1998)), *overruled on other grounds by Padgett v. Commonwealth*, 312

[6] This petition refers to the Wisconsin Supreme Court's decision in *Jensen I* as the decision below, although the decision under review is *Jensen III*. Because the court in *Jensen III* held that it was bound by *Jensen I* under the law-of-the-case doctrine, this Court may consider the reasoning in *Jensen I*. *See Hathorn v. Lovorn*, 457 U.S. 255, 261–62 (1982).

S.W.3d 336 (Ky. 2010). In *Bray*, for example, a woman called her sister on the phone and said she was scared because the defendant was outside of her mobile home. *Id.* at 744. Police officers later found the mobile home burned to the ground, with the victim's body inside. *Id.* at 743. The victim had a gunshot wound to the head. *Id.* A jury convicted the defendant of the arson and murder. *Id.* at 743–44. On appeal, the Kentucky Supreme Court held that the victim's "statements to her sister were made prior to the crime. A declarant's fearful statements over the telephone that a crime may occur do not alone establish 'circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .'" *Id.* at 746 (alteration in original) (footnote omitted) (quoting *Crawford*, 541 U.S. at 52).

Courts have found victims' statements non-testimonial in murder cases where the victims expressed fear that the defendants were going to kill them. In a case materially indistinguishable from Jensen's case, a murder victim told police officers (his coworkers) "that he would not commit suicide and that his wife would probably have something to do with it if he died." *Turner v. State*, 641 S.E.2d 527, 531 (Ga. 2007). The Georgia Supreme Court found the statements non-testimonial because they were "made in . . . conversation[s] with . . . friend[s], *before the commission of any crime*, and without any reasonable expectation that they would be used at a later trial." *Id.* (alterations in original) (emphasis added) (quoting *Demons v. State*, 595 S.E.2d 76, 80 (Ga. 2004)). Similarly, in *Demons*, a murder victim told a coworker "that [the defendant] was going to kill him." *Demons*, 595 S.E.2d at 79. The Georgia Supreme

Court found these statements non-testimonial because "they were made in a conversation with a friend, *before the commission of any crime*, and without any reasonable expectation that they would be used at a later trial." *Id.* at 80 (emphasis added).

A federal court reached a similar conclusion in *United States v. Mayhew*, 380 F. Supp. 2d 961, 971–72 (S.D. Ohio 2005). There, two weeks before the defendant allegedly killed his daughter, she wrote a letter to her mother discussing daily physical beatings by her father. *Id.* at 970–71. The court held that the victim wrote this letter "before the charged crimes occurred, thus, it can easily be categorized as non-testimonial." *Id.* at 972. It noted that a statement is non-testimonial if "made before the criminal act has occurred." *Id.* (quoting Friedman, *supra*, 86 Geo. L.J. at 1043).

These state and federal cases conflict with *Jensen I*. According to the Wisconsin Supreme Court, when deciding whether a statement is testimonial, "it does not matter if a crime has already been committed or not." (Pet-App. 76, ¶ 28.). But it does matter. A lot. Other courts have held that a statement that is made before the crime charged "almost certainly is not testimonial." *Bray*, 177 S.W.3d at 746 (quoting *Cromer*, 389 F.3d at 673). This split of authority involves "an important federal question" that this Court should resolve. U.S. Sup. Ct. R. 10(b).

B. The Wisconsin Supreme Court's ruling on the issue is wrong.

In the decision below, the Wisconsin Supreme Court held that (1) "under the standard we adopt here it does not matter if a crime has already been committed or

not," and (2) "[t]he focus of the inquiry is whether a 'reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime.'" (Pet-App. 76, ¶ 28 (quoting *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005)).) Both of those holdings are wrong. An application of correct legal principles shows that Julie's letter and voicemails to Kosman were not testimonial.

First, the decision below was wrong to hold that, when deciding whether a statement was testimonial, "it does not matter if a crime has already been committed or not." (Pet-App. 76 ¶ 28.) A statement is testimonial if "the primary purpose of the [police] interrogation is to establish or prove *past* events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphasis added). Law enforcement interrogations "'fall squarely within [the] class' of testimonial hearsay" when they are "solely directed at establishing the facts of a *past* crime, in order to identify (or provide evidence to convict) the perpetrator." *Id.* at 826 (alteration in original) (emphasis added) (quoting *Crawford*, 541 U.S. at 53). By definition, a statement that is made before a crime has been committed is "almost certainly" non-testimonial "because nothing has yet occurred 'to establish or prove.'" *Houchin v. Commonwealth*, No. 2008-SC-373-MR, 2009 WL 4251645, at *4 (Ky. Nov. 25, 2009) (first quoting *Bray*, 177 S.W.3d at 746, then quoting *Davis*, 547 U.S. at 822).

Second, the decision below took a wrong turn on future crimes because it adopted an overly broad definition of "testimonial" that conflicts with this Court's precedent. Even if a "statement might be used in the investigation or prosecution of a crime" (Pet-App. 76, ¶ 25 (quoting *Summers*, 414 F.3d at 1302)), the statement is not necessarily "procured with a primary purpose of creating an out-of-court substitute for trial testimony," *Clark*, 576 U.S. at 245 (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). To the contrary, this Court has "never suggested" that "all out-of-court statements that support the prosecution's case" are testimonial. *Clark*, 576 U.S. at 250. Instead, the test is "whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'" *Id.* at 250–51 (quoting *Bryant*, 562 U.S. at 358).

Although some courts have adopted the broad *Summers* test (Pet-App. 89 n.9 (collecting cases)), other courts have declined to adopt it as being overly broad, *see, e.g.*, *State v. Brown*, 173 P.3d 612, 635 (Kan. 2007), *abrogated on other grounds by State v. Williams*, 392 P.3d 1267 (Kan. 2017). Other courts have employed a broad test like the *Summers* one, only to scrap it in favor of this Court's more-recent "primary purpose" test. *See, e.g.*, *Commonwealth v. Wardsworth*, 124 N.E.3d 662, 675 n.18 (Mass. 2019).

Even the Tenth Circuit, which adopted this broad test in *Summers*, has since questioned the correctness of this test. *United States v. Smalls*, 605 F.3d 765, 777 (10th Cir. 2010). As that court noted, a statement's primary purpose might not be

testimonial even if a reasonable person "may well foresee that her statement might be used in the investigation or prosecution of a crime," such as a 911 call. *Id.*

Third, application of the "primary purpose" test to the facts of this case shows why Julie's letter and voicemails about a possible future crime were not testimonial. The primary purpose of those statements was not "to establish or prove past events" because no crime had yet been committed when Julie made those statements. *Davis*, 547 U.S. at 822. Although one perhaps could have expected that Julie's statements "might be used in the investigation or prosecution of a crime" (Pet-App. 76, ¶ 28 (quoting *Summers*, 414 F.3d at 1302)), her statements were not "procured with a primary purpose of creating an out-of-court substitute for trial testimony," *Bryant*, 562 U.S. at 358.

Indeed, law enforcement officers did not procure those statements. Law enforcement was not involved in creating Julie's letter or voicemails to Officer Kosman. These statements were not the product of a police interrogation.

The primary purpose of Julie's letter was to encourage police to investigate her anticipated death so that her sons would know that she did not commit suicide. The letter twice stated that Julie would not commit suicide because she loved her sons too much to take her own life. (Pet-App. 57, ¶ 7.) Julie did not even give the letter directly to Kosman despite telling him about it; she gave it to a neighbor instead. (Pet-App. 57, ¶ 6.) Julie thus had no way of guaranteeing that police would receive the letter. The letter's primary purpose was not to create a substitute for

testimony about a possible crime that had not yet occurred; its primary purpose was for Julie's sons to learn the true cause of her death if she were to die in an apparent suicide.

The primary purpose of Julie's voicemails was to confide in Kosman about her marital problems and to either get reassurance that she was safe or get police protection from future harm. In the voicemails, Julie asked Kosman to call her and said that if she died, Jensen would be her suspect. (R. 909:41, 127–28.) Julie was thus trying to end a threatening situation. Julie's in-person conversation with Kosman indicates that she was trying to confide in him when she left him voicemails. In person, Julie told Kosman that she thought Jensen was trying to kill her and make it look like a suicide. (R. 909:45–46.) Kosman later testified that Julie was "confused, scared, [and] somewhat emotional" at the start of the in-person conversation. (R. 909:45.) She calmed down the more they talked, and as she did, she said that she thought Jensen would not try to harm her. (R. 909:45–46.) Kosman explained that he thought Julie "just needed someone to talk to and maybe get some reassurance that everything was going to be okay." (R. 909:45.) The primary purpose of the voicemails was not to create a substitute for testimony about a possible crime that had not yet occurred.

Further, Julie's acquaintanceship with Kosman helps show that the letter and voicemails were not testimonial. She and Kosman did not have the usual police–citizen relationship. Kosman had more than 40 contacts with Julie since 1992 or

1993 about harassing behavior. (R. 834:42, 51–52; 909:51–56.) He had been to her residence about 30 times. (R. 909:53.) Kosman was thus someone Julie could trust to report her concerns to, and he was as much an acquaintance or a friend as a police officer. Despite this relationship, however, Kosman did not encourage Julie to make any statements implicating Jensen, nor were her statements the product of any formal police interrogation or questioning—hallmarks of statements that would generally be considered testimonial under this Court's precedents.

In sum, this Court should grant certiorari to resolve a split of authority on this "important federal question." U.S. Sup. Ct. R. 10(b).

II. CERTIORARI IS WARRANTED ON THE QUESTION WHETHER A STATEMENT TO POLICE BY A VICTIM OF ONGOING DOMESTIC ABUSE IS AIMED AT ENDING AN ONGOING EMERGENCY AND THUS NOT TESTIMONIAL.

The decision below held that Julie's voicemails to Officer Kosman were testimonial because they were not made during an ongoing emergency. This Court should grant certiorari to determine whether Julie's voicemails were made during an ongoing emergency. Addressing this issue would provide much-needed clarity for courts when addressing Sixth Amendment confrontation challenges in far-too-common cases of domestic abuse.

A. The Wisconsin Supreme Court's ruling on the issue conflicts with this Court's decisions.

In this Court's post-*Crawford* confrontation decisions, whether a victim's statement was testimonial has largely hinged on whether the statement's primary

purpose was to prevent future harm. This Court has referred to the risk of future harm as an "ongoing emergency." The decision below conflicts with those precedents.

In a joint opinion in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), this Court addressed victims' incriminating statements to police in two separate instances of domestic violence. In *Davis*, a 911 caller made a non-testimonial statement when she described a domestic disturbance and identified the defendant as the assailant. 547 U.S. at 817–18, 826–28. This Court reasoned that the 911 call's "primary purpose was to enable police assistance to meet an ongoing emergency" because the victim called 911 "to describe current circumstances requiring police assistance." *Id.* at 827–28. The victim's "statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* at 827. This Court assumed without deciding that the victim's statements after the defendant left the premises were testimonial because the emergency "appear[ed] to have ended" then. *Id.* at 828.

In *Hammon*, by contrast, this Court found the victim's statement testimonial partly because it was not made during an emergency. Police in *Hammon* responded to a reported domestic disturbance at the defendant's house. *Id.* at 819. While there, a police officer had the defendant's wife fill out a battery affidavit accusing the defendant of physically assaulting her. *Id.* at 820. This Court found the victim's statement testimonial because "[t]here was no emergency in progress" and "no immediate threat to [the victim's] person." *Id.* at 829–30. That is, the victim's "statements were neither

a cry for help nor the provision of information enabling officers immediately to end a threatening situation." *Id.* at 832. Distinguishing *Davis*, this Court noted that the victim in *Davis* "was seeking aid" from police, "not telling a story about the past." *Id.* at 831.

More recently in *Bryant*, a victim made a non-testimonial statement when he told police, while lying on the ground bleeding, that someone named "Rick" had shot him. 562 U.S. at 349. This Court reasoned that the primary purpose of the victim's statement was to allow police to meet an ongoing emergency because the scene was not yet secured and because the shooter's motive and whereabouts were unknown. *Id.* at 372–77. "During an ongoing emergency," this Court noted, "a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant." *Id.* at 368. The victim's statement did not indicate "that the threat from the shooter had ended." *Id.* at 372. The victim, in other words, did not suggest that "there was no emergency or that a prior emergency had ended." *Id.* at 377. He "gave no reason to think that the shooter would not shoot again if he arrived on the scene." *Id.* at 377.

This Court cautioned against "construing the emergency to last only precisely as long as the violent act itself, as some have construed our opinion in *Davis*." *Id.* at 374. It rejected the lower court's and defendant's "unduly narrow" view of what constitutes an ongoing emergency. *Id.* at 362–63, 373–74. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 363. This Court

explained that "[b]ecause *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*." *Id.*

In another domestic-violence case, *Clark*, this Court also drew a connection between the "ongoing emergency" concept and the risk of future harm. There, a three-year-old preschooler, L.P., made a non-testimonial statement when he told his teachers that the defendant had physically abused him. 576 U.S. at 246–51. This Court held that L.P.'s statement "occurred in the context of an ongoing emergency involving suspected child abuse." *Id.* at 246. It reasoned that, "[b]ecause the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help." *Id.* at 246–47. The teachers' "questions and L.P.'s answers were primarily aimed at identifying and ending the threat. . . . The teachers' questions were meant to identify the abuser in order to protect the victim from *future* attacks." *Id.* at 247 (emphasis added).

In the decision below, the Wisconsin Supreme Court correctly noted that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (Pet-App. 74 ¶ 19 (quoting *Davis*, 547 U.S. at 822).) Yet the court held that "Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead

sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial." (Pet-App. 76, ¶ 30.)

This reasoning takes an unduly narrow view of what constitutes an ongoing emergency, ignoring that Julie was a victim of continual psychological abuse who feared for her life. Julie's voicemails were aimed at ending an ongoing emergency. Officer Kosman received two voicemails from Julie about two weeks before she died. (Pet-App. 72, ¶ 6.) "Julie told Kosman in the second voicemail that she thought Jensen was trying to kill her, and she asked him to call her back." (Pet-App. 72, ¶ 6.) As the Wisconsin Supreme Court characterized the voicemails, "The crux of Julie's message was that Jensen had been acting strangely and leaving himself notes Julie had photographed and that she wanted to speak with Kosman in person because she was afraid Jensen was recording her phone conversations." (Pet-App. 76, ¶ 30.)

The Wisconsin Supreme Court's holding that Julie's voicemails were not made during an ongoing emergency is deeply problematic. "[T]he *Jensen I* court completely failed to consider the context in which Julie made her statements." (Pet-App. 7, ¶ 37.) Had the court considered this context, "it would have recognized that Julie was undeniably a victim of domestic abuse and that prior to her death she lived in terror born of the unimaginable fear that her husband was going to kill her and claim that her death was a suicide." (Pet-App. 7–8, ¶ 38.) The majority opinion in *Jensen I* did not mention "even in a passing phrase or fleeting word . . . that Julie was the victim of domestic abuse." (Pet-App. 9, ¶ 48.)

Under this Court's precedent, Julie's voicemails to Kosman were primarily aimed at ending an ongoing emergency. Because a battery in *Davis* was an emergency, Julie's fear that her husband would fatally poison her was likewise an emergency. Whether that emergency was ongoing depends on whether Julie faced a "continuing threat" when she left voicemails for Kosman. *Bryant*, 562 U.S. at 363. She did. Julie "was a victim of domestic abuse" and "believed there was an ongoing emergency as she feared her husband was going to kill her." (Pet-App. 11, ¶ 55.) This belief was not arbitrary; it was based on specific facts, including Jensen's suspicious behavior towards her and her observations about the strange items on Jensen's shopping list. And this belief is significant because "[t]he existence of an emergency or the *parties' perception that an emergency is ongoing* is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial." *Bryant*, 562 U.S. at 370 (emphasis added).

Like the child's statements to his teachers in *Clark*, Julie's voicemails to Kosman were meant to protect Julie from "future" harm. *Clark*, 576 U.S. at 247. Physical abuse was not actively in progress when the child in *Clark* made statements to his teachers or when Julie left voicemails for Kosman, but the scope of an emergency can extend beyond a violent act. *Bryant*, 562 U.S. at 374. Like the child in *Clark*, Julie's voicemails indicated that she "needed help." *Clark*, 576 U.S. at 247. Julie's voicemails were "primarily aimed at identifying and ending the threat" to her life. *Id.* Unlike the victim's testimonial statements in *Hammon*, Julie's voicemails were "a cry for help" for

the police "to end a threatening situation." *Davis*, 547 U.S. at 832. Like the victim in *Davis*, Julie "was seeking aid" from police instead of "telling a story about the past" when she left voicemails for Kosman. *Id.* at 831.

In short, this Court should grant certiorari because the Wisconsin Supreme Court's decision "conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c).

B. Whether Julie's voicemails were made during an ongoing emergency raises an important question with nationwide legal implications.

There is a strong need for this Court to explore whether or how victims' statements about possible future domestic abuse can be non-testimonial. "Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides . . . ." *Giles v. California*, 554 U.S. 353, 405 (2008) (Breyer, J., dissenting). "Domestic abuse, or interpersonal violence, is a significant public health issue. About one in four women and one in seven men have experienced an act of physical violence from an intimate partner in their lifetime." (Pet-App. 8, ¶ 40.) And "over half of female homicide victims in the United States are killed by a current or former intimate partner." (Pet-App. 8, ¶ 40.)

Unfortunately, prosecuting cases of domestic abuse "is often a difficult, if not impossible, task because abusers' actions often render their victims unavailable to testify." (Pet-App. 8, ¶ 41.) This Court has recognized that domestic violence "is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." *Davis*, 547 U.S. at 832–33. "Acts of domestic violence often are

intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." *Giles*, 554 U.S. at 377. Crimes of domestic violence are thus "difficult to prove in court because the victim is generally reluctant or unable to testify," sometimes because the victim has been murdered, which is "not an uncommon occurrence." *Id.* at 405 (Breyer, J., dissenting).

So, the ability to prosecute many cases of domestic abuse will often hinge on whether a court determines that the victim made his or her accusatory statements during an ongoing emergency. This area of the law needs further guidance from this Court.

Whether Julie's voicemails were made during an ongoing emergency, and whether the absence of an emergency renders those voicemails testimonial, raise "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." U.S. Sup. Ct. R. 10(c). Given the widespread nature of domestic violence and the difficulty of prosecuting abusers without their victims' testimony, this Court should grant certiorari to explain whether Julie's voicemails were testimonial.

III. THIS CASE IS AN APPROPRIATE VEHICLE.

The Wisconsin Supreme Court's decision in *Jensen I* conflicts with decisions by this Court, other state supreme courts, and federal courts of appeals in multiple ways discussed above. This conflict is a compelling reason for granting certiorari. U.S. Sup. Ct. R. 10(b) and (c).

Although the Wisconsin Supreme Court relied on the law-of-the-case doctrine in the decision under review, "[l]aw-of-the-case principles are not a bar to this Court's jurisdiction." *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 n.7 (1987). This Court has a "right to re-examine" federal questions that were "determined in the earlier stage of [state proceedings]" if "the first decision of the state court became the law of the case." *Hathorn v. Lovorn*, 457 U.S. 255, 261–62 (1982) (alteration in original) (quoting *Reece v. Georgia*, 350 U.S. 85, 87 (1955)).

The question presented here is a legal one concerning the definition of "testimonial" for Sixth Amendment confrontation purposes. Although this case has a lengthy procedural history, the question presented involves simple facts: brief statements that Julie made in two voicemails and one written letter. It involves a legal question that applies broadly in cases of ongoing domestic abuse.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Dated this 10th day of August 2021.

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