No. 21-210

IN THE
SUPREME COURT OF THE UNITED STATES

WISCONSIN,

Petitioner,

v.

MARK D. JENSEN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF IN OPPOSITION

Andrea Taylor Cornwall
Counsel of Record
Dustin C. Haskell
Lauren J. Breckenfelder
STATE PUBLIC DEFENDER
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-4805
cornwalla@opd.wi.gov

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STATEMENT OF THE CASE

1. In 2002, the State charged respondent Mark D. Jensen with first-degree intentional homicide, alleging that he poisoned his wife, Julie Jensen ("Julie"). Pet. App. 72. At respondent's preliminary hearing, the State presented testimony from the Jensens' neighbor that Julie had given him an envelope a few weeks before her death. *Id.* Julie "told him that if anything happened to her, [he] should give the envelope to the police." *Id.*

The envelope contained a letter addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg." Pet. App. 72. It described "suspicious behaviors" by respondent, including a list of supplies Julie had found in his day planner that was "not meant for [her] to see." *Id.* (She originally also included a photograph of this list of supplies in the envelope, though she later retrieved it and gave it directly to the police. *Id.*) In her letter, Julie stated that while she did not smoke or drink, respondent kept encouraging her to drink with him. *Id.* Julie also listed the various medications she took. *Id.* She explained that her relationship with respondent had "deteriorated to the polite superficial" and that he had "never forgiven" her for an affair she had years earlier. *Id.* Julie emphasized that she "would never take my life because of my kids," but that she was "suspicious of [respondent's] suspicious behaviors [and] fear[ed] for [her] early demise." *Id.* She noted that "if anything happens to me, [respondent] would be my first suspect." *Id.*

The State also presented testimony from Ron Kosman, one of the police officers to whom Julie had addressed her letter. Pet. App. 72. Julie had contacted Kosman

numerous times during the prior six years, mostly regarding harassing phone calls and pornographic photos left at her house. Jan. 24, 2008 Trial Tr. at 42-43.[1] Kosman testified that Julie had left him two voicemails approximately two weeks before her death. Pet. App. 72. In these voicemails, Julie had said that respondent "had been acting strangely and leaving himself notes [she] had photographed," *id.* 76; that "she wanted to speak with Kosman in person because she was afraid [respondent] was recording her phone conversations," *id.*; that "if she were found dead, [respondent] should be Kosman's 'first suspect,'" *id.* 1; and that she thought respondent was trying to kill her, *id.* 72. Julie did not ask in her message for any kind of immediate help. Instead, she simply asked Kosman to call her back. *Id.*

Respondent filed a motion before trial seeking to exclude the letter and both voicemails. Pet. App. 72. The State conceded the voicemails were inadmissible hearsay but sought the ability to introduce the letter. *Id.* 72-73. The circuit court thus evaluated the letter under Wisconsin's hearsay rules as well as *Ohio v. Roberts*, 448 U.S. 56 (1980), which at that time governed whether evidence was barred by the Confrontation Clause. *Id.* The circuit court held that the letter cleared both hurdles and was admissible. *Id.*

Before trial commenced, however, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* holds that the Confrontation Clause prohibits the introduction of "testimonial" hearsay absent a prior opportunity to cross-examine the declarant. 541 U.S. at 68. Respondent then moved for reconsideration of the circuit

[1] Citations to "Trial Tr." refer to *Wisconsin v. Jensen*, No. 2002-CF-314 (Wis. Cir. Ct.).

court's ruling that the letter was admissible. Pet. App. 73. The circuit court held that both the letter and the voicemails were testimonial and thus barred by the Confrontation Clause. *Id.*

2. On interlocutory appeal by both parties, the Wisconsin Supreme Court agreed with the trial court that the letter and the voicemails were testimonial and remanded for further proceedings. Pet. App. 73, 77, 81.

Focusing first on the letter, the court noted that testimonial statements include those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Pet. App. 74 (quoting *Crawford*, 541 U.S. at 51-52). The court then stressed that, "[r]ather than being addressed to a casual acquaintance or friend, the letter was purposely directed toward law enforcement agents" and "describe[d] [respondent's] alleged activities and conduct in a way that clearly implicate[d] [respondent] if 'anything happen[ed]' to" Julie. *Id.* 76. The court also noted that the letter referred to respondent as a "suspect." *Id.* The court concluded that the "content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death." *Id.*

In so holding, the court rejected the State's argument that because the letter had been "created before any crime had been committed[,] . . . there was no expectation that the letter would potentially be available for use at a later trial." Pet. App. 76. Because the circumstances demonstrated that 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," it "[did] not matter if a crime ha[d] already been committed or not." *Id.*

The court followed similar reasoning to conclude that the voicemails were testimonial. The court explained that they were "not made for emergency purposes or to escape from a perceived danger" but rather "to relay information in order to further the investigation of [respondent's] activities." Pet. App. 76.

Despite holding the letter and voicemails were testimonial, the court did not definitively rule on their admissibility. Instead, the court noted that after *Crawford*, as before, defendants can forfeit their right to confrontation by wrongdoing. Pet. App. 77; *see Crawford*, 541 U.S. at 62. The court then adopted a "broad" conception of that forfeiture doctrine and remanded to the circuit court to determine whether respondent had forfeited his confrontation right. Pet. App. 81.

3. On remand, the circuit court held that respondent had forfeited his right to confront the testimonial statements attributed to Julie because he "had caused [her] absence from the trial"—that is, because a preponderance of the evidence suggested that he had poisoned her. Pet. App. 58. The State introduced the statements at respondent's jury trial in 2008, and he was convicted. *Id.* 58-59.

4. Four months after respondent's conviction, this Court clarified the scope of the forfeiture-by-wrongdoing exception to the Confrontation Clause in *Giles v. California*, 554 U.S. 353 (2008). Specifically, this Court held that it is not enough to cause a witness's unavailability; a defendant forfeits his confrontation right only by intentionally preventing a witness from testifying. *Giles*, 554 U.S. at 368. Otherwise,

courts find forfeiture based on assuming the truth of the very criminal allegations the prosecution needed to prove at trial. *See id.* at 365. Respondent appealed his conviction, arguing that he had not forfeited his right to confrontation. Pet. App. 59.

The Wisconsin Court of Appeals began by adhering to the state supreme court's prior holding that the letter and voicemails were testimonial. Pet. App. 60. The court then declined to decide whether the statements were admissible under *Giles*, holding that, even assuming they were erroneously admitted, any error was harmless. *Id.* 61.

5. After the Wisconsin Supreme Court denied review, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin, challenging the court of appeals' harmless-error holding. Pet. App. 49. In 2013, the district court granted the petition and ordered respondent released from custody unless "the State initiate[d] proceedings to retry him" within 90 days. *Id.*; *see also Jensen v. Schwochert*, 2013 WL 6708767, at *17 (E.D. Wis. Dec. 18, 2013). The Seventh Circuit affirmed. *See Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015).

6. The State indicated that it intended to retry respondent, and in 2016, respondent moved again in the state trial court to exclude Julie's letter and voicemails. Pet. App. 50. The circuit court denied the motion, holding that the statements were nontestimonial under this Court's intervening applications of *Crawford* in *Michigan v. Bryant*, 562 U.S. 344 (2011), and *Ohio v. Clark*, 576 U.S. 237, 245 (2015). *Id.* The court further found that the letter and (contrary to the State's initial concession) voicemails were admissible under the exceptions to Wisconsin's rule against hearsay

for present-sense impressions and statements of recent perception.[2] July 13, 2017 Hearing Tr. at 99-100.[3]

The State then moved to reinstate respondent's conviction, asserting that the evidence at a new trial would be materially similar to that at his first trial. Pet. App. 51. The circuit court granted the motion, and the federal district court held that reinstatement of respondent's conviction complied with its habeas order. *Id.* 54-55. The Seventh Circuit affirmed. *Id.* 45-48.

7. Respondent appealed his reinstated conviction to the Wisconsin Court of Appeals. Noting that the Wisconsin Supreme Court had previously held that Julie's statements were testimonial and that the federal habeas court had held that their introduction was not harmless, the court reversed. Pet. App. 22, 24-25.

8. The State sought review in the Wisconsin Supreme Court. Pet. App. 2. The court granted review, reevaluated its earlier decision under this Court's intervening Confrontation Clause jurisprudence, and affirmed. *Id.* 4, 7.

The court noted that both *Bryant* and *Clark* "flesh[ed] out" this Court's earlier guidance regarding the "testimonial" concept. *Id.* 5, 7. *Bryant* "clarif[ied] what it means . . . for a statement to have the primary purpose of 'enabl[ing] police assistance to meet an ongoing emergency,'" *id.* 5 (quoting *Bryant*, 562 U.S. at 359), and *Clark*

[2] While the State initially argued that Julie's letter was admissible as an excited utterance, it had dropped this theory by the time of this ruling.
[3] Citations to "July 13, 2017 Hearing Tr." refer to *Wisconsin v. Jensen*, No. 2002-CF-314 (Wis. Cir. Ct.).

considered "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause," *id.* 6 (quoting *Clark*, 576 U.S. at 246).

Because neither *Bryant* nor *Clark* "contradicted *Crawford* or *Davis* [*v. Washington*, 547 U.S. 813, 822 (2006)] [or] drastically altered the Confrontation Clause analysis," Pet. App. 6, the court again held that Julie's statements were testimonial, *id.* 7. In doing so, it noted that its prior decision had anticipated *Bryant*'s instruction that the test for testimonial statements requires an objective evaluation of the totality of the circumstances. *Id.* And by "reject[ing] the State's argument that 'the government needs to be involved in the creation of the statement' for that statement to be testimonial," the court's earlier decision anticipated *Clark*'s explanation that "at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns." *Id.*

REASONS FOR DENYING THE WRIT

This case involves highly unusual out-of-court statements seemingly tailor-made to implicate the Confrontation Clause: a letter and voicemails addressed to the police, pointing a finger at a "suspect" and describing various facts and events to aid a potential investigation and prosecution. The Wisconsin Supreme Court faithfully applied this Court's jurisprudence to hold that the statements, under the particular facts and circumstances of this case, were testimonial.

Meanwhile, no other court has encountered a case with remotely comparable facts. That means that no court has come to a contrary conclusion regarding the Confrontation Clause's applicability to statements like Julie's. And given that statements

like Julie's would likely be barred anyway by most states' rules against hearsay, a Confrontation Clause case like this is also unlikely to arise in any other jurisdiction in the future. If the Court wishes at some point to amplify the already substantial guidance it has provided on the "testimonial" concept, it should wait for a more common or constitutionally significant fact pattern.

A. The Wisconsin Supreme Court's decision does not conflict with any other ruling.

A statement is testimonial when its "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution," *Davis v. Washington*, 547 U.S. 813, 822 (2006)—in other words, to provide evidence to law enforcement authorities to serve as "an out-of-court substitute for trial testimony," *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). By contrast, a statement is not testimonial when it is merely "a casual remark to an acquaintance." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Nor is a statement testimonial where its primary purpose is "to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry," *Bryant*, 562 U.S. at 363, one that involves an objective evaluation of the totality of the circumstances, *see id.* at 360.

While the State pitches this case as involving two questions presented, the Court's Confrontation Clause "totality-of-the-circumstances" framework collapses them into one: Were Julie's statements, considered in light of all the relevant surrounding circumstances, testimonial? The Wisconsin Supreme Court held that they

were, and the State cannot point to any other court whose precedent would have required it to hold differently.

1. The State first points to *Bray v. State*, 177 S.W.3d 741 (Ky. 2005), *overruled on other grounds by Padgett v. State*, 312 S.W.3d 336 (Ky. 2010). In that case, the Kentucky Supreme Court considered a phone call the murder victim made to her sister the night she died. The victim told her sister that "she was 'scared' and needed to talk," that the defendant had been sitting outside her house for "quite a while" and was carrying a flashlight, and that she "feared for her life." *Id.* at 744. When her sister told her to call emergency services, the victim said that she had already called, but "they won't come because it's a domestic problem and the law won't get involved until there has been someone hurt." *Id.*

The court held that these statements were not testimonial. *Bray*, 177 S.W.3d at 746. The State focuses on the court's observation that the statements "were made prior to the crime." Pet. at 17 (quoting *Bray*, 177 S.W.3d at 746). But this was just one factor the court considered in reaching its conclusion. Equally—if not more—important were the facts that the victim's statements were "spontaneous" and "directed to her sister." *Bray*, 177 S.W.3d at 745. Considering "the content and the context of the conversation," the court also stressed that the victim called her sister "in the throes of fear—not to provide evidence for use at a future trial." *Id.* at 746. "Her frantic statements . . . describing her ongoing observations were not indicative of the calculated reflections engaged in by one seeking to preserve evidence." *Id.*

Julie, by contrast, directed her statements not to a family member or close friend but to police officers. She did not relay ongoing observations—much less any immediate threat to her person—but rather described general concerns and recounted historical facts about herself and her husband. She took the time to write out her letter, pre-address the envelope, and give it to a neighbor with clear instructions on what to do with it should "anything happen[]" to her. Pet. App. 72. It is hard to think of a fact pattern more "indicative of the calculated reflections engaged in by one seeking to preserve evidence," *Bray*, 177 S.W.3d at 746. Her voicemails likewise relayed suspicious past behavior by respondent, her "first suspect," and sought to provide more information to Officer Kosman to aid his investigation. Pet. App. 76.[4]

2. The State next cites *Turner v. State*, 281 Ga. 647 (2007). While that case involved statements made to police officers, a key fact distinguishes it from respondent's: the *victim himself* was a police officer, and the "record ma[de] clear that [he] was speaking to his police-officer co-workers *as his close friends* when he made the statements indicating that he would not commit suicide and that his wife would probably have something to do with it if he died." *Turner*, 281 Ga. at 651 (emphasis added). Though the Georgia Supreme Court mentioned the fact that the statements were made before the commission of the crime, their social context played a much bigger role in that court's conclusion that they were not testimonial. *See id.*

[4] As for *Houchin v. State*, 2009 WL 4251645 (Ky. Nov. 25, 2009), which the State cites later in its petition, *see* Pet. at 19, the statements in that case were casual remarks made by the defendant's wife to her co-workers. *See Houchin*, 2009 WL 4251645, at *3. Those statements, too, were quite different from Julie's premeditated statements to a police officer.

So too in *Demons v. State*, 277 Ga. 724 (2004), where the Georgia Supreme Court held that statements "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" were not testimonial. *Id.* at 727-28. The recipient of the statements in *Demons* was "a close friend in whom [the victim] would confide intimate and very personal details about his relationship with [the defendant]." *Id.* at 727. As this Court has noted, "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Ohio v. Clark*, 576 U.S. 237, 249 (2015).

3. Finally, the State references *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005). But this case could not create a split of authority because it is merely a federal district-court case. In any event, its Confrontation Clause reasoning is dicta. *See Mayhew*, 380 F. Supp. 2d at 971 (holding "that the Confrontation Clause is not implicated because the statements are not hearsay").

B. The question raised by this case is unlikely to arise in other jurisdictions.

In the nearly twenty years since *Crawford* was decided, no other case has raised the question whether statements like those here are testimonial. But even if another factual scenario like this were to arise, it would still be unlikely to raise any issue under the Confrontation Clause because most jurisdictions would hold that statements like Julie's are inadmissible hearsay.

1. Wisconsin exempts present-sense impressions from its hearsay rule. *See* Wis. Stat. § 908.03(1). Like most jurisdictions, Wisconsin defines a present-sense impression as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Id.*; *see also, e.g.,* Fed. R. Evid. 803 (similar). The trial court held that Julie's letter and voicemails fell within this definition, July 13, 2017 Hearing Tr. at 99-100, thus teeing up the question whether they were barred by the Confrontation Clause.

But most jurisdictions would not conclude that statements like Julie's constitute "present-sense impressions." To satisfy the definition of a present-sense impression, courts generally require that a statement "directly pertain to perception" and be made "only while or 'immediately after' the declarant 'perceived' the event or condition," lest "sufficient time elapse[s] to . . . permit[] reflective thought." 2 McCormick on Evid. § 271 (8th ed. 2020). These requirements ensure "that the statement is reliable, since it is contemporaneous with the event or occurrence and there was no time for reflection, faulty recollection, or deliberate misrepresentation." 31A C.J.S. *Evidence* § 478 (2021).

Much of what Julie relayed in her statements—that she did not drink, that she took various medications, that she had had an affair years earlier—was mere statement of fact, unrelated to her "perception." And her most incriminating statement—that respondent was planning to kill her—was a conclusion based on particular observations. "Once reflective narratives, calculated statements, deliberate opinions,

conclusions, or conscious 'thinking-it-through' statements enter the picture, the present sense impression exception no longer allows their admission." *Fischer v. State*, 252 S.W.3d 375, 381 (Tex. Crim. App. 2008).

Even if Julie's statements "directly pertain[ed] to [her] perception," 2 McCormick on Evid. § 271, the record does not establish *when* Julie reached her conclusion that she thought respondent was planning to kill her, or when, relative to reaching that conclusion, she wrote the letter and left the voicemails. "In the absence of a demonstrable time period or interval between the statements and the events to which they purportedly relate, there is no basis for the application of the present sense impression hearsay exception." 31A C.J.S. *Evidence* § 479 (2021). This is because "[t]he underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication." *United States v. Parker*, 936 F.2d 950, 954 (7th Cir. 1991) (citation omitted). Intervals of less than ten minutes can undermine this rationale by giving the declarant an "opportunity to reflect," thereby rendering the exception inapplicable. *Davis v. State*, 133 P.3d 719, 729 (Alaska Ct. App. 2006) (five to ten minutes); *see also People v. Ortiz*, 822 N.Y.S.2d 327 (N.Y. App. Div. 2006) (seven minutes).

2. Perhaps realizing that it was stretching the present-sense impression exception beyond its breaking point, the trial court also held that the letter and voicemails satisfied a hearsay exception for "statements of *recent* perception" made by an una-

vailable declarant. *See* Wis. Stat. § 908.045(2) (emphasis added); July 13, 2017 Hearing Tr. at 99-100. But Hawaii and Kansas are the only other states that recognize such a hearsay exception. Haw. Rev. Stat. § 626-1, Rule 804(b)(5); Kan. Stat. § 60-460(d). This confirms that virtually no other state would allow the admission of statements like those here.

3. Finally, premeditated accusations like Julie's do not carry the indicia of reliability generally found in statements of present-sense impression and other exceptions to the hearsay rule. Rather, they implicate the core concerns of the rule against hearsay: that "[t]he declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; [or] his words might be misunderstood or taken out of context by the listener." *Williamson v. United States*, 512 U.S. 594, 598 (1994). (Recall that the State itself initially conceded that Julie's voicemails were inadmissible hearsay. *See* Pet. App. 73.)

For all of these reasons, if any court were ever presented with statements similar to those here, it would likely deem them inadmissible hearsay, meaning that the confrontation question would never arise.

C. The Wisconsin Supreme Court's fact-intensive holding is correct.

In summarizing the Wisconsin Supreme Court's reasoning, the State exclusively cites the court's first opinion in this case, which it refers to as the "decision below." *See* Pet. at 16 n.6. But this misrepresents the Wisconsin Supreme Court's reasoning, which it updated to account for this Court's jurisprudential developments between 2007 and 2021. *See* Pet. App. 4-7. At any rate, "this Court reviews judgments,

not opinions[.]" *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). All that matters at this stage, therefore, is whether the Wisconsin Supreme Court correctly held that Julie's statements were testimonial. Based on the specific and highly unusual facts here, it did.

1. A statement is testimonial when "the circumstances objectively indicate" that its "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution," not "to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006); *accord Ohio v. Clark*, 576 U.S. 237, 244 (2015). Considering that Julie addressed her letter to the police, referred to respondent as a "suspect," and "describe[d respondent's] alleged activities and conduct in a way that clearly implicate[d him] if 'anything happen[ed]' to her," the Wisconsin Supreme Court properly concluded that "[t]he content and the circumstances surrounding the letter ma[d]e it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death." Pet. App. 76.

As for the voicemails, the Wisconsin Supreme Court noted that they relayed "that [respondent] had been acting strangely and leaving himself notes Julie had photographed" and sought to enlist Officer Kosman in his investigative capacity. Pet. App. 76. Because these messages, like Julie's letter, relayed past suspicious behavior by respondent that Julie sought to bring to the attention of the police, the court properly concluded that they were "not made for emergency purposes or to escape from a perceived danger," but rather "to relay information in order to further the investigation of [respondent's] activities." Pet. App. 76.

Granted, "[l]aw enforcement was not involved in *creating*" Julie's statements. Pet. at 21 (emphasis added). But this Court has repeatedly rejected the notion that police interrogation or procurement is a necessary condition of a testimonial statement. *See Davis*, 547 U.S. at 822 n.1 (noting that, because "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation," statements "made in the absence of any interrogation are [not] necessarily nontestimonial"); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 316 (2009) ("Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a 'witness against the defendant' than one who is responding to interrogation") (internal citation omitted); *Michigan v. Bryant*, 562 U.S. 344, 370 (2011) ("'volunteered testimony' is still testimony and remains subject to the requirements of the Confrontation Clause") (quoting *Davis*, 547 U.S. at 822 n.1).

Moreover, Julie directed her statements to the police. The State attempts to portray Kosman as "someone Julie could trust to report her concerns to, . . . as much an acquaintance or a friend as a police officer." Pet. at 23. The only evidence the State cites for this proposition is the fact that Kosman had had more than 40 contacts with Julie during the six years preceding her death and had been to her house about 30 times. *Id.* at 22-23. But Kosman testified that the majority of these contacts were in regard to harassing phone calls the Jensens had received "or other strange incidents occurring around the home"—that is to say, standard police-citizen interactions. Jan.

24, 2008 Trial Tr. at 42-43. In all events, Julie directed her statements to Officer Kosman in his official capacity, just as a "witness" typically does. *See, e.g.*, *Davis*, 547 U.S. at 830. And Julie's letter was addressed not only to Kosman, but also to Detective Ratzenburg and the Pleasant Prairie Police Department, Pet. App. 72, establishing that the intended recipient was law enforcement, not an acquaintance.

2. The State—by means of two questions presented—attacks the Wisconsin Supreme Court's holding in two ways. But neither argument is persuasive.

a. The State's principal argument is that a statement made before a crime occurs can virtually *never* be testimonial. *See* Pet. at 19. This assertion both misstates the law and flies in the face of common sense.

Time and again the Court has made clear that statements are evaluated for testimonial purposes under the totality of the circumstances. *See Clark*, 576 U.S. at 245; *Bryant*, 562 U.S. at 359; *Davis*, 547 U.S. at 822. The Court has never suggested that the timing of a statement in relation to the crime should control the outcome of this assessment. Such a proposition would rule out statements that surely must be considered testimonial. For example, consider an affidavit, signed by a junior accountant and placed in an envelope addressed to the local prosecutor's office, stating that the accountant's boss was planning to commit tax fraud when filing the company's taxes the following week and describing specific preparations the boss had made to that effect. Imagine further that the accountant included a cover note saying he hoped this affidavit would provide useful evidence for an eventual prosecution. Surely that affidavit would be testimonial.

This scenario is not that far off from the facts of this case. Julie addressed her letter to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg"; gave it to a neighbor with the instruction that he give it to the police "if anything happened to her"; described a list of suspicious supplies she had found in respondent's day planner; laid out a motive respondent would have to kill her; dispelled alternative explanations for her potential death; and stated that, "if anything happens to me, [respondent] would be my first suspect." Pet. App. 72. Viewed objectively, these circumstances show that Julie was building a record for respondent's prosecution should she be unable to testify—i.e., that "the 'primary purpose' of the [letter] was to 'creat[e] an out-of-court substitute for trial testimony,'" *Clark*, 576 U.S. at 245.

To the degree timing matters in determining whether a statement is testimonial, it is the timing of the "events potentially relevant to later criminal prosecution" that a statement seeks to "establish or prove" that matters, not necessarily when the crime itself occurred. *Davis*, 547 U.S. at 822. Julie's statements largely described events that had already happened: her affair, respondent's list-making and suspicious notes, his attempts to get her to drink alcohol. Any objective observer would view these past events as "potentially relevant to later criminal prosecution" of the man Julie identified as the "first suspect" in her anticipated murder. *See Davis*, 547 U.S. at 822.

b. The State also contends that Julie's voicemails were nontestimonial because they were made in the midst of an "ongoing emergency," namely a relationship involving domestic abuse. Pet. at 23-29. This argument is not properly presented here. It also falters on law and fact.

First, the State did not make its "ongoing emergency" argument to the Wisconsin Supreme Court. In fact, the State explicitly disclaimed any such argument, contending that Julie's statements were not testimonial even though they were made "to law enforcement and *not* in an emergency." Reply Brief of Petitioner at 10 (Oct. 1, 2020) (emphasis added); *see also* Brief of Petitioner at 31-32 (Aug. 6, 2020) (failing to argue that voicemails were made during an emergency).[5]

This failure to press the argument it now makes in the state high court is fatal. "Principles of comity in our federal system require that the state courts be afforded the opportunity" to consider federal constitutional arguments before such arguments are made in this Court. *Webb v. Webb*, 451 U.S. 493, 499 (1981); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."). It does not matter that the concurrence below considered the "ongoing emergency" issue sua sponte. If a federal argument was neither pressed by the party seeking review nor passed on by the controlling opinion below, the argument is not properly preserved for certiorari. *Adams v. Robertson*, 520 U.S. 83, 86

[5] Citations to Brief and Reply Brief of Petitioner refer to *Wisconsin v. Jensen*, No. 2018-AP-1952-CR (Wis. Sup. Ct.).

(1997). Such is the case here. Because the State "was well aware of the [ongoing emergency argument] available to it" yet explicitly conceded the issue, it has waived the argument. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012).

Preservation problems aside, the content and context of Julie's voicemails clearly distinguish them from situations the Court has found to be ongoing emergencies. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant*, 562 U.S. at 363. A key fact here is that Julie did not call 911. Instead, she called Kosman directly. When he did not pick up, she did not then try 911 or otherwise request immediate assistance. Rather, she left him a voicemail and called him back later, leaving another voicemail requesting that he return her call. This is a far cry from the "frantic" 911 call in *Davis*, during which the victim was being actively assaulted. *See* 547 U.S. at 818, 827. While Julie said she feared in general for her life, nothing in the record suggests that she feared an "immediate threat to her person" of the sort present in *Davis*, *id.* at 830, or that there was an ongoing threat to anyone else, as with the shooter on the loose in *Bryant*, 562 U.S. at 377-78. In fact, she repeatedly declined offers of assistance from Kosman and a neighbor. *See* Jan. 24, 2008 Trial Tr. at 47-48; Jan. 17, 2008 Trial Tr. at 118-20, 124.

In this way, Julie's voicemails were more like the testimonial affidavit Amy Hammon provided in *Hammon v. Indiana*, decided jointly with *Davis*. Hammon had recently been assaulted by her husband, and presumably had reason to fear that he might assault her again at some point in the future. But when she gave the state-

ments in question, "[t]here was no emergency in progress" because "there was no *immediate* threat to her person." *Davis*, 547 U.S. at 829-30 (emphasis added). The officer who arrived at the scene "testified that he had heard no arguments or crashing and saw no one throw or break anything." *Id.* at 829. Julie, likewise, did not face an "immediate threat to her person," *id.* at 830. Nothing in the record suggests that respondent was even physically proximate to her when she left the voicemails.

In an attempt to bolster its new "ongoing emergency" theory, the State argues that the lower court would have recognized Julie's voicemails as testimonial had it not "ignor[ed] that Julie was a victim of continual psychological abuse who feared for her life." Pet. at 27. But it is no wonder the court did not discuss a history of abuse. The State *did not argue* that such a history existed, much less that it should impact the Confrontation Clause analysis. *See* Brief of Petitioner (Aug. 6, 2020); Reply Brief of Petitioner (Oct. 1, 2020). In any event, there is no support in the record for the State's assertions. The jury was not asked to determine whether respondent had abused Julie before her death. *See* Feb. 18, 2008 Trial Tr. at 28-30. Nor does the evidence presented at trial support such a finding. Even if there were some need to further refine how the Confrontation Clause applies to situations involving ongoing domestic abuse, this case would be a poor vehicle to do so because it does not involve a clear history of domestic abuse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Andrea Taylor Cornwall
Counsel of Record
Dustin C. Haskell
Lauren J. Breckenfelder
STATE PUBLIC DEFENDER
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-4805
cornwalla@opd.wi.gov

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