No.

2019-2020

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM DENOLF

Petitioner-Appellant

V.

THE STATE OF OLYMPUS

Respondent-Appellee

ON WRIT OF CERTIORARI TO THE UNITED STATES

SUPREME COURT OF THE STATES OF OLYMPUS

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Bobby Bronner's Sixth Amendment right to confront his accuser was violated by the introduction of Andy Sommerville's hearsay declarations?

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U.S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Bronner was arrested February 9, 2016 and charged with crimes related to human trafficking. *Record* 5. Andy Sommerville was among those interviewed by Task Force agents and did not appear to have any knowledge about the allegations against Bronner. *Id*. 5. Officers also interviewed a School Resource Officer at Andy Sommerville's school named Chris Rael. *Id*. 5. Officer Rael told law enforcement that on Wednesday February 10, 2016 that he was worried about Andy. *Id*. 5. He was "well-acquainted" with the child, having been in his classroom several times since Andy Sommerville had been in kindergarten. *Id*. 5. Officer Rael had also helped break up a fight and mediate a dispute in a kickball game between Andy Sommerville and another classmate. *Id*. 5. Officer Rael reported Andy to be a usually energetic child with many friends, but on this Wednesday, "Andy Sommerville appeared sullen and during recess he kept to himself, did not make eye contact with others, did not eat his lunch, and his eyes appeared red and moist as if he had been crying." *Id*. 5. Officer Rael was wearing his police uniform on this day. *Id*. 5. He asked Andy if he was okay and if he needed help. *Id*. 5. Andy did not fully answer Officer Rael's question if he needed help, replying that he was "fine." *Id*. 5. The next day, Thursday, February 11, 2016, Andy came to Officer Rael's office (which in no way indicated Officer Rael was a police officer). *Id*. 5. Andy told Officer Rael something was bothering him that he did not fully understand. *Id*. 5. Andy said he has witnessed one of "Bobby's dirty movies" called "Super Bowl Party." *Id*. 5. He said it was gross like the "other ones," had men and kids in it, and his sister Samantha *Id*. 5, 6. Andy asked what might happen to Bronner since he had been arrested, asking "will he go to jail?" *Id*. 6. Officer Rael did not take notes during his talk, wrote notes after the meeting. *Id*. 6. When Task Force agents showed up at Andy's school, Officer Rael stressed that he was "worried about Andy Sommerville's welfare." *Id*. 6. Rael told Task Force

agents Andy "might" think he was a police officer, "at least" on the days he wore his "traditional" uniform. *Id*. 6. Under Olympus law, children must be at least ten years old to testify in court. *Id*. 6. This statue was intended to "protect the physical and psychological well-being of victims under ten years of age associated with testifying in court about painful experiences including sexual and physical assault." *Id*. 6. Andy Sommerville had stated he knows lying is bad and he believes that if he tells a lie then he is sinning, and that God will punish him for his sins. *Id*. 6. Bronner objected to the admission of Officer Rael's testimony of his conversation with Andy based on his perception of a 6th Amendment violation of his right to confront witnesses. *Id*. 7. This objection was overruled, and Bronner's attorneys did cross-examine Officer Rael. *Id*. 7. A witness testified to his knowledge that he had heard Bronner possessed child pornography. *Id*. 7. A jury returned a guilty verdict on both the human trafficking and possession of child pornography charges. *Id*. 7.

Summary of Arguments

Out-of-court testimony was prohibited in the Confrontation Clause of the 6th Amendment by the Framers. In *Crawford v. Washington*, cross-examination was deemed necessary to test the truth of statements and the reliability of witnesses. The place of face-to-face confrontation has developed over time. At the time of the framing, it was left to the states to develop their own laws concerning non-testimonial statements. Additionally, *Ohio v. Clark* calls up the fact that the Confrontation Clause does not prohibit out-of-court statements that would have been admissible at the time of the founding.

Crawford created the evidentiary rule which says testimonial statements may only be admitted if the witness is unavailable to testify AND the defendant had prior opportunity for cross examination. Alternate options to physical confrontation have emerged. *Davis v. Washington* created the primary purpose test, and *Clark* upholds that "when the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the Confrontation Clause." Exceptions based on finding testifying in court would bring harm to, in particular, a child witnesses mental, psychological, or physical health are seen in *State v. Contreras* and *Seely v. State*.

Clark upholds the primary purpose test, but says it is necessary but not always sufficient for the exclusion of out-of-court statements. Andy Sommerville's statements pass the primary purpose test in *Davis* and indicated through these other considerations in *Clark* that his statements were: those of a young child barred from testifying in court to protect his wellbeing, nontestimonial, made during an ongoing emergency to a trusted adult in an informal setting. Respondent argues that Andy's statements were nontestimonial. Bobby Bronner's 6th Amendment right to confrontation was not violated by the admission of Andy Sommerville's

hearsay declarations because he was not attempting to aid a prosecutorial effort, and he was in an ongoing emergency. Andy's statements to Officer Rael indicate his intent was not to preserve evidence. *Crawford* distinguishes between statements made formally to a law enforcement officer versus casual remarks made to an acquaintance. Andy's mentality was not of a person bringing forth proof of criminal acts in order for action to be taken by a law enforcement official. Officer Rael's primary function was not to prosecute criminal behavior, rather to create a safe environment at school among other duties such as serving as an informal counselor. This overturns the presumptively testimonial nature of Andy's remarks to Rael. Second: Andy Sommerville's statements were non-testimonial because he was in the midst of an ongoing emergency. *Clark* determined a young child is unlikely to speak for the purpose of creating evidence, and Andy falls into this category because of his age and the circumstances placing him in an ongoing emergency.

ARGUMENTS

I) ANDY SOMMERVILLE'S STATEMENTS ARE ADMISSIBLE IN COURT VIA OFFICER RAEL'S TESTIMONY BECAUSE HE WAS NOT ATTEMPTING TO AID A PROSECUTORIAL EFFORT, WHICH IS ONE REASON THEY ARE NON-TESTIMONIAL.

A. The 6th Amendment applies to witnesses who specifically bear testimony against the accused. Therefore, the 6th Amendment Confrontation Clause does not apply in the case at bar.

In *Crawford*, the standard for admitting testimonial statements is as follows: "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 36 (2004). When it comes to non-testimonial statements, it is under the state's power to develop this hearsay law. *Crawford,* 541 U.S. at 68. The Confrontation Clause is not absolute, and there are exceptions.

In the case at bar, we argue that Andy's statements to Officer Rael were non-testimonial, which resolves the issue of a potential violation of Bronner's 6th Amendment confrontation rights. The Confrontation Clause does not apply here, so no 6th Amendment right of Bronner's was violated. Even if Andy's statements were testimonial, unavailability is demonstrated by the Olympus State law barring any child under the age of 10 from testifying in Court. *United States v. Yates* says the unavailability of a witness must be demonstrated in order to be exempt from physical testimony. *United States v. Yates*, 438 F.3d 1307, 1326 (11th Cir. 2006). The Olympus State law is in place to protect the physical and psychological well-being of young children, which is a compelling government interest under *Maryland v. Craig* and *Yates*. *Yates*, 438 F.3d

at 1330, *Maryland v. Craig,* 497 U.S. 836, 836 (1990). Though the *Craig* test is often put on the backburner in favor of more recent court rulings, it hasn't been overturned and the logic is still relevant. Again, if Andy's statements were hypothetically testimonial and he was legitimately unavailable, Bronner's attorneys did cross examine Officer Rael. *Record* 7. This would be an acceptable alternative to face-to-face confrontation with Andy. *Crawford* says the Confrontation "Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford,* 541 U.S. at 61. If the evidence admitted into Court was testimonial, there was an opportunity for an alternative method of cross-examination due to an unavailable witness. Both the arguments for Andy's unavailability and the existence of a prior opportunity for cross examination are simply support that either way, testimonial or not, Andy's statements would be admitted. We argue that his statements were non-testimonial, so the issue of the 6th Amendment Confrontation Clause is inapplicable.

B. Andy's statements to Officer Rael make it clear he was not attempting to create a record for trial.

Crawford determined that an accuser making a formal statement to law enforcement is different than making an offhand remark to an acquaintance. *Crawford*, 541 U.S. at 51. Andy Sommerville was neither an accuser building a case for trial, nor was he speaking to Officer Rael as an agent of law enforcement, but rather as a friend. In the case at bar, it is a fact that Officer Rael was "well-acquainted" with Andy Sommerville. *Record* 5. Even if Andy knew Rael was an officer, he confided in him while Rael was wearing his "soft-uniform" and when he was in a room that has nothing pointing to the fact that Rael was a police officer. *Id*. 5. Andy offered no

evidence in a formal setting to the Task Force, and only confided in Officer Rael in an informal setting. Rael attempted to make Sommerville feel comfortable, allowing the child to speak and not asking any questions, and he took notes after the encounter. Andy only felt safe to divulge information about the child pornography when Bronner has been arrested and charged. *Id*. 5. Andy's uncertainty about the outcome, asking "will he go to jail?" shows he does not have any expectations about the consequences of his actions – Andy did not come to Rael with any intention of imposing punishment on his stepfather.

Andy's intent was not to create a record for trial, and countering the argument that he was attempting to aid the prosecution, *State v. Henderson* concluded that concerning a child victims testimony, the child's "awareness or lack thereof, that [their] statement would be used to prosecute, is not dispositive of whether [their] statement is testimonial. Rather, it is but one factor to consider." *State v. Henderson*, 160 P. 3d 776, 779 (Kan. 2007).

C. Officer Rael's primary function was not to prosecute criminal behavior, fulfilling the requirement to prove other intent when it comes to presumptively testimonial statements to law enforcement.

Clark calls courts to evaluate statements "in context, and part of that context is the questioner's identity….Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial…" *Ohio v. Clark*, no. 13-1352 576 U.S. ____, 2182 (18 June 2015). The position Officer Rael holds – School Resource Officer – is defined in the case at bar as "sworn law enforcement officers responsible for safety and crime prevention in schools." *Record* 5. Their purpose is to "work closely with school administrators in an effort to create a safer environment," and additionally they "serve as educators, emergency managers, and informal counselors." *Id*. 5. Officer Rael's

primary purpose is not to uncover and prosecute criminal behavior. Informal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused, and, in fact, Andy did not undergo any actual questioning.

Seely differentiated between statements made to government officials and non-officials. As Officer Rael is legally a government official, the statements made to him by Andy would be judged by the "primary-purpose test" under which "a statement is testimonial if it made for the primary purpose of creating evidence," and is presumptively testimonial but can be shown to be nontestimonial where the primary purpose of the statement is not obtain assistance in an emergency. *Seely v. State*, 282 S.W. 3d 778, 781 (Ark. 2008). The phrasing "primary purpose of the statement" places more importance on the intent of the speaker rather than the questioner. This is in line with *Clark's* change from *Davis*, where Justice Alito says it is unlikely a young child would intend their statements to be given as testimony to preserve evidence. *Clark*, 576 U.S. ____ at 2182.

II) ANDY SOMMERVILLE'S STATEMENTS ARE ALSO NON-TESTIMONIAL AND THUS ADMISSIBLE BECAUSE HE WAS IN AN ONGOING EMERGENCY.

A. Andy's statements were not testimonial when evaluated in *Clark*, going further than just the primary purpose test.

Clark considers (but does not limit itself to) if there is an ongoing emergency, the identity of the questioner, the formality of the interrogation, and the age of the witness when determining the inclusion or exclusion of out-of-court statements. It is a change from the *Davis* primary purpose test, which the *Clark* Court says is a necessary but not always sufficient condition for the exclusion of out-of-court statements. The Court recognizes that the Confrontation Clause does

not prohibit statements that would have been admissible at the time of the founding. *Clark*, 576 U.S. ____ at 2180. Andy is in an ongoing emergency because of the threat Bronner and the men he was involved with pose to his family. Officer Rael's identity to Andy was not a law enforcement agent; he came to Rael in a time of need as a trusted adult. The interrogation was informal at best. Andy's age falls under the Olympus State statute which prevents him from testifying in court to protect him from mental and other forms of harm to his health.

1. *Clark* determined a young child is unlikely to speak for the purpose of creating evidence, and Andy falls into this category because of his age and the circumstances placing him in an ongoing emergency.

Clark displays an evolution in doctrine; where *Davis* had placed importance on the intent of the questioner and speaker (perhaps more so on the speaker), *Clark* modifies this and is more concerned with the purpose of the speaker. *Clark*, 576 U.S. ____ at 2182.

In *Contreras*, the child hearsay exception is referenced and says the following: it provides that unless the source, method, or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a "physical mental, or emotional, or developmental age of 11 or less" discussing an act of child abuse or neglect, or any offense involving an unlawful sexual act is admissible in evidence in any civil or criminal proceeding if: the court finds in an outside hearing the statement provides "sufficient safeguards of reliability" and the child testifies or is unavailable as a witness. *State v. Contreras,* 979 So. 2d 896, 899 (Fla. 2008). Andy's statements would be admissible under the child victim hearsay doctrine. The record does not provide evidence against Andy's trustworthiness. He states he knows lying is a sin. *Record* 6. Officer Rael's relationship with Andy goes past a typical student-teacher or law enforcement position, as the record states he was well-acquainted with Andy and

had been in his class multiple times since kindergarten – Andy also knew exactly where to find Officer Rael. *Id*. 5. Officer Rael could notice the change in Andy's demeanor, and stated to the Task Force he was concerned with Andy's welfare. *Id*. 6. Officer Rael's job holds him to a higher standard, and he has knowledge of the law. Officer Rael would not bring this testimony to court if he did not have evidence or belief of its reliability. Under Olympus State law aimed at protecting his well-being, Andy is an unavailable witness. *Id*. 6. *State v*. *Spencer*, as cited in *Seely*, builds upon the presumptively testimonial assumption. A witnesses statements are presumed testimonial if they are *knowingly* made to a police officer, but "a statement is presumed non-testimonial…if the declarant had objective reason to believe that the statement served only to avert or mitigate an imminent or immediate danger and the agent receiving the statement lacked intent to create evidence *State v*. *Spencer,* 339 Mont. 227, 230-31, 169 P.3d 384, 388 (2007) *788 the defendant."); as cited in *Seely*, 282 S.W. 3d at 781. Andy was not going to Rael as a police officer, as made clear by the intent of his statements. He did not make statements knowing or attempting to aid a prosecutorial effort. Officer Rael, receiving the statement, does not perform any action that indicates he was attempting to *create* evidence. He took notes only after listening to Andy and specified to Task Force officers he was worried about Andy's welfare. *Id*. 5. These circumstances point to resolving an ongoing emergency, not creating evidence against Bronner.

B. Andy would not have been released into a safe home environment.

Contreras concedes that "a witness's unavailability can be premised on a mental or emotional infirmity or harm, as well as physical absence," placing error on the Fourth District for positing the witness in *Contreras* was not unavailable. *Contreras,* 979 So. 2d at 899. Protecting a child from trauma they will endure by testifying in a case of sexual abuse is sufficient to classify

unavailability, and this is what the Olympus State law does. Though it is categorical, the individual, specific, detailed mindsets of every child under 10 would be impossible to ascertain, so this law offers protection under findings that emotional and psychological problems typically accompany sexual abuse, particularly by a family member. *Seely*, 282 S.W. 3d at 781. Handling the treatment of Andy's statements include ensuring his continued safety, and *Seely* supports that "such a statement may be relevant to prevent future occurrences of abuse and to the medical safety of the child." *Seely*, 282 S.W. 3d at 781.

Andy states the pornography he potentially witnessed had boys Andy's age in it, as well as a family member (his sister, Samantha), and was in the possession of another family member (his stepfather, Bobby Bronner). Even with Bronner in police custody, and even if Bronner was not involved in the physical actions of the video, Andy's home cannot be considered a safe environment. Clearly, there is child neglect occurring. As far as we know men supposedly involved in the video are not in custody, and Andy has witnessed other pornographic films in Bronner's possession. *Record* 6.

Andy may not have thought the video was related to Bronner's arrest because he claimed there had been "others," but he knew it was bad and "gross," so he was triggered when Bronner was arrested, and this precipitated his decision to confide in Officer Rael. This is not an attempt to create a record for trial, but to escape an unsafe environment. According to the Federal Bureau of Investigation, human trafficking is the third largest criminal enterprise in the world. Evidence from an informant led the Task Force to believe much of the DeNolf trafficking operation would leave the state of Olympus after the Super Bowl and travel to Las Vegas for a prize fight, presumably to continue their human trafficking ring. On February 6, an agent reported she had seen adult entertainment advertisements previously associated with Bronner that read: "if you are

going to the Heavyweight Championship fight in Las Vegas on February 9 to call and ask for B.B." *Record* 4. Bronner was arrested on February 9, 2016. *Id*. 5. If Bronner had not been arrested, it would have risked the wellbeing and safety of other children like Andy. Clearly, the welfare of Andy, as well as countless other children, were put at risk by Bronner. But unlike potential human trafficking victims, Andy is not rid of Bronner's presence in his life as they are family members. Therefore, Andy's statements were made in circumstances of an ongoing emergency and were not testimonial.

C. The "interrogation" Andy chose to begin himself was informal.

Davis decided that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington,* 547 U.S. 813, 813-14 (2006).

This was the situation with McCottry's statements in *Davis*, but not in *Hammon v. Indiana*, as cited in *Davis*, which was decided with *Davis*. Hammon's statements were in circumstances where the interrogation was a part of a criminal investigation into past conduct, which the testifying officer acknowledged. *Hammon v. Indiana*, 126 S. Ct 2266 (2006); cited in *Davis,* 547 U.S. at 813-14. The statements McCottry made were spoken about as presently occurring during an ongoing emergency. These statements were necessary to resolve this emergency. *Davis,* 547 U.S. at 813-14. *Davis* holds that the statements made in cases before their Court are the products of interrogations "which in some circumstances tend to generate testimonial responses," but even when interrogation exists, it is the "declarant's statements, not the interrogators questions" that are evaluated. *Davis,* 547 U.S. at 822-23.

The statements Andy made to Officer Rael were ongoing. He had found child pornography in the past, and there is no fact in the record to tell us there were not more similar videos. Additionally, there is no knowledge men potentially involved in the making of "Super Bowl Party" had been apprehended. Based on Andy's statements, there were young boys in the film, and Andy claimed to have seen his sister Samantha in the video. As a young boy himself, a family member of Samantha, and the stepson of Bronner who was charged with both human trafficking and possession of child pornography, Andy's safety is an immediate issue. The circumstances in the case at bar do not objectively indicate that there is no ongoing emergency, nor that Andy was attempting to prove past events.

Conclusion

Bobby Bronner's 6th Amendment right to confrontation was not violated by the admission of Andy Sommerville's hearsay declarations for two primary reasons. The first: Andy Sommerville was not attempting to further a prosecutorial effort. Andy Sommerville was not attempting to prove any past events or create a record for trial, he was confiding in a trusted adult. *Crawford* reiterates that the 6th Amendment applies to "witnesses" who specifically "bear testimony" against the accused. *Crawford,* 541 U.S. at 51. Therefore, the 6th Amendment Confrontation Clause does not apply in the case at bar. Andy's statements to Officer Rael indicate his intent was not to preserve evidence. *Crawford* distinguishes between statements made formally to a law enforcement officer versus casual remarks made to an acquaintance. *Crawford,* 541 U.S. at 51. Andy's mentality was not of a person bringing forth proof of criminal acts in order for action to be taken by a law enforcement official. Officer Rael's primary function was not to prosecute criminal behavior, rather to create a safe environment at school among other duties such as serving as an informal counselor. This overturns the presumptively testimonial

nature of Andy's remarks to Rael. *Seely*, 282 S.W. 3d at 781. Second: Andy Sommerville's statements were non-testimonial because he was in the midst of an ongoing emergency. *Clark* determined that the primary purpose test was a necessary but not always sufficient condition for the exclusion of out-of-court statements. Andy Sommerville's statements indicated through these other considerations in *Clark* that his statements were: those of a young child barred from testifying in court to protect his wellbeing, nontestimonial, made during an ongoing emergency to a trusted adult in an informal setting.

Respectfully Submitted,

Counsel for the Respondent.