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STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP1952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MARK D. JENSEN,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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The State of Wisconsin seeks this Court's review of the court of appeals' February 26, 2020, decision reversing the Kenosha County Circuit Court's judgment convicting Mark D. Jensen of the first-degree intentional homicide of his wife Julie. *See State v. Jensen*, 2018AP1952-CR (Wis. Ct. App. Feb. 26, 2020); (Pet-App. 101–13).For the reasons explained in this petition, this Court should grant the State's petition, reverse the court of appeals' decision, and remand for further proceedings in the court of appeals.

ISSUES PRESENTED

1. Did the court of appeals ignore an established exception to the law-of-the-case doctrine when it concluded that it and the circuit court were bound to follow this Court's 2007 holding that Julie Jensen's statements were testimonial?

The State argued in the court of appeals that decisions of the United States Supreme Court narrowing the definition of testimonial since 2007 allowed the circuit court to revisit this Court's decision. The court of appeals held that *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), required both it and the circuit court to follow this Court's earlier decision.

2. Did the circuit court correctly determine that, under the narrower definition of testimonial adopted by the Supreme Court since 2007, Julie's statements are nontestimonial?

The State argued below that the statements were nontestimonial under the narrower definition of testimonial. The court of appeals did not reach this issue, concluding that it and the circuit court had to follow this Court's earlier decision.

3. Should this Court remand to address the remaining issues that the court of appeals did not decide

because of its holding that it was bound by this Court's prior decision?

The State and Jensen briefed three other issues in the court of appeals. They are (1) whether the circuit court erred by reentering Jensen's judgment of conviction without a new trial, (2) whether the circuit court violated a federal court decision granting Jensen habeas corpus relief by reinstating the judgment, and (3) whether the judge at Jensen's trial was biased against Jensen. The court of appeals concluded that it did not need to address these issues in light of its decision to grant Jensen a new trial on his other claim. It also reaffirmed its prior decision rejecting Jensen's judicial-bias claim.

CRITERIA FOR GRANTING REVIEW

Review is appropriate because the court of appeals' decision conflicts with Wisconsin case law addressing the law-of-the-case doctrine and its exceptions. *See* Wis. Stat. § (Rule) 809.62(1r)(d). Review is also appropriate because the scope of the law-of-the-case doctrine and its exceptions are matters of statewide importance. *See* Wis. Stat. § (Rule) 809.62(1r)(c)2.

Additionally, review is warranted because a decision by this Court will help develop, clarify, and harmonize the law. *See* Wis. Stat. § (Rule) 809.62(1r)(c). The changes to the definition of testimonial since this Court's earlier decision call for the application of new legal doctrines to the case's facts. *See* Wis. Stat. § (Rule) 809.62(1r)(c)1. These changes also make this Court's prior decision holding that Julie's statements were testimonial ripe for reexamination. *See* Wis. Stat. § (Rule) 809.62(1r)(e).

STATEMENT OF THE CASE

This case has a long history. The State relies on this Court's and the court of appeals' previous decisions for record citations where possible. (R. 152; 628.) *See State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518 (*Jensen I*); *State v. Jensen*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482 (*Jensen II*).

The charges against Jensen, pretrial proceedings, and Jensen's conviction

Julie Jensen died in 1998 of ethylene glycol poisoning. (R. 1:1–6.) In 2002, the State charged Jensen with first-degree intentional homicide for killing Julie. (R. 1:1.)

At the preliminary hearing, the State introduced statements that Julie had made before her death. (R. 628:2–4.) Police Officer Ron Kosman testified that Julie left him two voicemails just before she died. (R. 628:3.) In the second one, Julie told Kosman that she thought Jensen was trying to kill her. (R. 628:3.) In a later conversation, "Julie told Kosman that she saw strange writings on Jensen's day planner, and she said Jensen was looking at strange material on the Internet." (R. 628:3.) Julie also told Kosman that "if she were found dead, that she did not commit suicide, and Jensen was her first suspect." (R. 628:3.) Julie also told Kosman that she had given a neighbor a letter to give to police if something happened to her. (R. 909:45–46.)

Kosman further testified that Julie had contacted him 40 to 50 times since 1992 or 1993. (R. 834:42, 51–52.) These contacts involved her reporting harassing telephone calls and pornographic photos left at Jensen and Julie's residence that Julie thought were 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.)

Julie's neighbor Tadeusz Wojt testified that just before she died, Julie gave him an envelope and told him to give it to the police if anything happened to her. (R. 628:2.) Detective Paul Ratzburg testified that, the day after Julie died, Wojt gave him the envelope. (R. 628:3–4.)

A letter from Julie was in the envelope. (R. 628:3–4.) It was addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzburg." (R. 628:3–4.) The letter said, in part, "[I]f anything happens to me, [Jensen] would be my first suspect." (R. 628:4.) She explained that she was suspicious of Jensen's behaviors and feared for her life. (R. 628:4.) Julie also said that she was not suicidal or taking drugs. (R. 628:4.)

The court bound Jensen over for trial. (R. 628:4.) Jensen challenged the admissibility of Julie's statements to Kosman and the letter, claiming that they violated his right to confrontation. (R. 36; 628:4.) The State conceded that Julie's post-voicemail statements to Kosman were testimonial but argued that the letter and the second voicemail were not. (R. 152:6 628:6.) It also argued that all the statements were admissible under the forfeiture-by-wrongdoing doctrine. (R. 628:5–6.)

The court eventually concluded that the letter and the voicemail were testimonial and thus inadmissible in light of the United States Supreme Court's then-recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). (R. 628:5.) It also rejected the State's argument that Julie's statements were admissible under the forfeiture-by-wrongdoing doctrine. (R. 628:5.)

The State appealed. (R. 628:6.) On bypass, this Court held that Julie's letter and voicemail were testimonial. (R. 152:17–19.) It also adopted a "broad" forfeiture-by-wrongdoing 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. (R. 152:32–33, 35.) The Court remanded for a hearing to allow the circuit court to apply this forfeiture standard. (R. 152:35–36.)

On remand, the circuit court concluded that Jensen forfeited his right to confront Julie by causing her absence from trial and admitted all of her statements. (R. 628:7.) A jury convicted Jensen of first-degree intentional homicide. (R. 628:9.)

Jensen's direct appeal

After Jensen's conviction, but before his appeal, the United States Supreme Court decided *Giles v. California*, 554 U.S. 353 (2008). (R. 628:9.) *Giles* rejected the "broad" forfeiture doctrine that this Court had adopted. (R. 628:10–11.) The Supreme Court held that to forfeit the right to confrontation, the defendant must have caused the witness's unavailability with the intent to keep the witness from testifying. *Giles*, 554 U.S. at 361–68. Thus, it was not enough for the defendant to have merely caused the victim's unavailability.

On appeal from his conviction, Jensen argued that, under *Giles*, the circuit court's forfeiture decision was wrong and required reversal. (R. 628:11.) He also argued that the circuit court was biased against him. (R. 628:36–38.)

This court of appeals affirmed. It assumed that the circuit court had erroneously admitted the statements but held that their admission was harmless error "because of the staggering weight of the untainted evidence and cumulatively sound evidence presented by the State." (R. 628:38; *see also* 628:15–27.) It also rejected Jensen's judicial bias claim. (R. 628:26–38.)

This Court denied Jensen's petition for review. (R. 633.)

Jensen's federal habeas corpus petition

Jensen then filed a petition for a writ of habeas corpus in the Eastern District of Wisconsin. *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013) (He asserted that the admission of Julie's testimonial statements violated his right to confrontation. *Id.* *6.

The State did not dispute that Julie's statements were testimonial. *Id.* Rather, it advanced three arguments: first, that *Giles* did not apply to the case because it had not been decided when the circuit court made its forfeiture ruling, *id.* *6–7; second, that forfeiture by wrongdoing applied because the evidence showed that Jensen killed Julie to keep her from testifying at a potential family-court proceeding, *id.* *8–9; and third, any error in the admission of Julie's statements was harmless, *id.* *9.

The court granted Jensen's petition. *Id.* *7. The court first rejected the State's arguments that *Giles* did not apply and that Jensen intended to keep Julie from testifying in family court. *Id.* *7–9. It next concluded that the admission of Julie's statements under the circuit court's pretrial forfeiture-by-wrongdoing decision violated Jensen's confrontation rights. *Id.* *9. Finally, the court held that the statements' admission was not harmless error. *Id.* *9–16.

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.* *17.

The State appealed, and the Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015) Like the district court, the Seventh Circuit rejected the State's argument that *Giles* should not apply. *Id.* at 899–01. It then affirmed the district court's holding that the admission of the statements was not harmless. *Id.* 901–08.

Post-habeas proceedings in the circuit court and federal court

In January 2016, the circuit court vacated Jensen's judgment of conviction and held a bond hearing. (R. 937.) The parties began to prepare for trial. (R. 937:18–20.)

Among other things, the parties disputed whether Julie's statements would be admissible at retrial. Jensen moved to preclude introduction of the statements. (R. 659:4; 938:6–7.) The parties extensively briefed whether the statements would be admissible. (R. 659; 709; 743; 761; 763; 765; 769; 773; 775.)

The circuit court held that Julie's statements were admissible. (R. 946:73–79, Pet-App. 115–21.) It determined that under *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173 (2015), and *Michigan v. Bryant*, 562 U.S. 344 (2011), which the Supreme Court had issued since *Jensen I*, the statements were no longer testimonial. (R. 946:73–79, Pet-App. 115–21.) The court also determined that the statements were admissible under the present-sense-impression and statement-of-recent-perception hearsay exceptions. (R. 946:99–101, Pet-App. 122–24.)

The State then did two things. First, it filed a motion to clarify in the Eastern District. (R. 791:22–27.) It told the federal court that it intended to move the circuit court to reinstate Jensen's judgment of conviction based on the circuit court's confrontation ruling. But, the State explained, it wanted to ensure that such a step did not violate the federal court's order granting habeas relief. (R. 791:26–27.) It asked the court to explain if it intended its grant of habeas relief to require the State to conduct a jury trial or just to "recommence its prosecution of Jensen." (R. 791:26.)

Second, the State moved the circuit court to reinstate Jensen's judgment of conviction. (R. 791.)

While that motion was pending, the Eastern District granted the motion for clarification. (R. 804.) It held that the State had complied with its order to initiate proceedings to retry Jensen within 90 days. (R. 804:5.) The court declined to say what it would do if the state court reinstated Jensen's conviction, concluding that such a ruling would be an advisory opinion since the circuit court had not yet acted. (R. 804:6.)

The circuit court then granted the State's motion to reinstate Jensen's judgment of conviction. (R. 810, Pet-App. 114; 811, 813, Pet-App. 128–29; 949:7–9, Pet-App. 125–27.) It concluded that there was no need for a new trial because the evidence at it would be the same as it was at his 2008 trial. (R. 811; 813:1, Pet-App. 128; 949:7–9, Pet-App. 125–27.)

After the circuit court entered the judgment of conviction, Jensen asked the Eastern District to enforce its judgment granting habeas relief, claiming that the State violated the order by reinstating the judgment. *Jensen v. Clements*, No. 11-C-803, 2017 WL 5712690, at *1 (E.D. Wis. Nov. 27, 2017) (*Clements*), (Pet-App. 130–36).

The court denied Jensen's request. *Id.* at *1, 3–7. It rejected his argument that the court's order required a retrial without Julie's statements. *Id.* at * 3. Instead, the court said, the order required only that the State begin retrial proceedings. *Id.* The court then determined that once the State complied with the writ, the court lost jurisdiction over Jensen's habeas case and Jensen needed to challenge his new conviction in a new federal petition. *Id.* at *4–7.

Jensen appealed. *Jensen v. Pollard*, 924 F.3d 451 (7th Cir. 2019) (*Pollard*), (Pet-App. 137–41). The Seventh Circuit affirmed, agreeing with the district court that the State had complied with the order granting habeas relief. *Id.* at 455–56.

Jensen's appeal and the court of appeals' decision

Jensen appealed his reinstated judgment of conviction. (R. 822.) He argued that the circuit court (1) violated his right to a jury trial by reinstating the judgment of conviction without conducting a new trial, (2) had no authority to revisit the admissibility of Julie's statements, (3) violated the federal-court order granting him habeas corpus relief, and (4) was biased against him at his trial. Jensen raised the latter claim to preserve it for future federal habeas proceedings, if necessary. (Pet-App. 12 n. 7.)

The court of appeals reversed the circuit court's judgment of conviction. It concluded that the circuit court erred by reinstating the judgment of conviction because it could not decide that Julie's statements were nontestimonial. (Pet-App. 10–12.) Specifically, the court held that, under *Cook*, both it and the circuit court were bound to follow this Court's 2007 decision holding that the statements were testimonial. (Pet-App. 11.) The court explained that only this Court can overrule, modify, or withdraw language from its prior decisions. (Pet-App. 11.)

The court also concluded that, given its decision, it did not need to address whether the circuit court violated Jensen's right to a trial by reinstating the judgment. (Pet-App. 10.)

The court did not directly address whether the circuit court had violated the federal court's orders granting Jensen habeas relief. But it said that a new trial "was envisioned by the federal district court when it returned this case to the circuit court with instructions to 'release [Jensen] from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." (Pet-App. 12 (alteration in original) (citation omitted).)

Finally, the court decided that its decision to grant Jensen a new trial and its prior decision that Jensen had not proven the claim meant that it did not need to address his claim of judicial bias. (Pet-App. 12 n.7.)

ARGUMENT

I. The court of appeals ignored the law-of-the-case doctrine and its exception for a change in controlling authority when it held that the circuit court was bound by this Court's 2007 conclusion that Julie's statements were testimonial.

This Court should grant review to explain that the law-of-the-case doctrine is the correct legal analysis for a court to apply when revisiting a prior appellate decision because of a change in the controlling law. The court of appeals applied the wrong law when it held that, under *Cook*, the circuit court was bound by this Court's decision in *Jensen I* because only this Court can overrule or modify its own decisions. The court ignored that a change in the applicable law since the earlier decision can justify a departure from the law of the case. The court of appeals' error warrants this Court's review.

A. Courts may revisit a prior appellate decision on a legal issue when the controlling law has changed since the earlier decision.

"The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" *State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 664 N.W.2d 82 (citation omitted). But there are "certain circumstances, when 'cogent, substantial, and proper reasons exist,' under which a court may disregard the

doctrine and reconsider prior rulings in a case." *Id.* ¶ 24 (citation omitted).

For example, "a court should adhere to the law of the case 'unless. . . controlling authority has since made a contrary decision of the law applicable to such issues,'" *id.* (citation omitted), or controlling authority has been modified, *Welty v. Heggy*, 145 Wis. 2d 828, 839, 429 N.W.2d 546 (Ct. App. 1988). "[A]n intervening change in the law, or some other special circumstance" can justify reexamining a claim. *United States v. Story*, 137 F.3d 518, 520 (7th Cir. 1998) (quoting *United States v. Thomas*, 11 F.3d 732, 736 (7th Cir. 1993)). In addition, an incorrect prior decision may be grounds for disregarding the law of the case. *See McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300, 305 (1929).

Whether a decision establishes the law of the case is a question of law that this Court reviews de novo. *Stuart*, 262 Wis. 2d 620, ¶ 20. But since "the law of the case is a question of court practice, and not an inexorable rule," deciding whether to apply it "requires the exercise of judicial discretion." *State v. Brady*, 130 Wis. 2d 443, 448, 338 N.W.2d 151 (1986).

B. This Court should grant review to clarify that the law-of-the-case doctrine, not *Cook*, governed the circuit court's decision to revisit whether Julie's statements were testimonial.

The court of appeals applied the wrong law when it held that the circuit court had no authority to revisit this Court's 2007 holding that Julie's statements were testimonial. The correct law is the law-of-the-case doctrine, and it allowed the circuit court to revisit this Court's prior decision based on subsequent changes to confrontation law.

The court of appeals held that, under this Court's decision in *Cook*, the circuit court could not decide that

Julie's statements were no longer testimonial. (Pet-App. 11.) *Cook* holds, among other things, that only this Court has the power to overrule, modify, or withdraw language from its opinions and published court of appeals opinions. *Cook*, 208 Wis. 2d at 189. *Cook*, the court of appeals said, required both it and the circuit court to follow this Court's decision in *Jensen I* that Julie's statements were testimonial. (Pet-App 11–12.)

That conclusion was wrong. *Cook* does not address the law-of-the-case doctrine. It says that only this Court can overrule, modify, or withdraw language from Wisconsin's precedential court opinions. The circuit court did not do any of these things. It did not purport to change the content of *Jensen I*. Rather, the court determined that the Supreme Court, in *Clark* and *Bryant*, had modified the definition of testimonial adopted in *Jensen I*, and this allowed it to revisit this Court's earlier decision about Julie's statements. The law-of-the-case doctrine governs this analysis, and the court of appeals erred by holding otherwise.

This Court's prior law-of-the-case decisions show that the circuit court could properly revisit this Court's *Jensen I* holding based on a change in the law. At least twice this court has said that a circuit court can disregard an appellate court's legal ruling in a published opinion when the law changes.

In *Mullen v. Coolong*, the court of appeals, in a published decision, reversed a grant of summary judgment in favor of an insured and, instead, ruled that the insurance company was entitled to summary judgment. 153 Wis. 2d 401, 403–04, 451 N.W.2d 412 (1990). The court's decision was based on an interpretation of a statute governing car insurance coverage. *Id.* This Court denied the insured's petition for review. *Id.* at 404. But, before it did so, this Court had accepted a case that involved interpreting the

same statute. *Id*. In that case, this Court eventually reached a conclusion that would have been favorable to the insured in *Mullen*. *Id*. at 404–05. But by the time of the later decision, the parties had settled the case and the circuit court had dismissed it. *Id*. at 405.

The insured sought relief from the dismissal in the circuit court based on the new decision. *Id*. at 404–05. The court granted the motion, concluding that following the court of appeals' decision in the case would be unjust. *Id*. at 408. The court of appeals reversed this decision. It said that the circuit court had to follow its prior, published decision. *Id*. at 405–06.

This Court reversed. *Id*. at 408–11. It rejected "the proposition that a trial court lacks authority under any circumstances to grant relief following a remittitur from a court of last resort." *Id*. at 410. This Court held the circuit court had good cause to grant relief from the dismissal because its decision "was necessary to accomplish substantial justice." *Id*. at 408. This conclusion, the court explained, was consistent with its law-of-the-case decisions, which held that trial courts may reconsider an appellate order in certain circumstances. *Id*. at 410–11. These circumstances include a change in controlling legal authority. *Id*.

In support of its conclusion, this Court relied on its decision in *Brady*. *Id*. at 410–11. There, a circuit court suppressed evidence as the fruits of an illegal arrest, the court of appeals affirmed in a published decision, and this Court denied review. *Brady*, 130 Wis. 2d at 445–46. Afterwards, the United States Supreme Court decided *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good-faith exception to the exclusionary rule. *Brady,* 130 Wis. 2d at 446. The State asked the circuit court to reconsider its suppression decision in light of *Leon*, but it

declined to do so, concluding that the court of appeals' decision was the law of the case. *Id.* The court of appeals certified the State's appeal to this Court. *Id.*

This Court declined to reverse the circuit court. *Id.* But the Court recognized that the "law of the case doctrine allowed trial court reconsideration of an appellate order in certain circumstances, for example, if the 'controlling authority has since made a contrary decision of the law applicable to such issues.'" *Mullen*, 153 Wis. 2d at 410–11 (citing *Brady*, 130 Wis. 2d at 448).

Thus, this Court has held that a circuit court has the authority to revisit prior appellate decisions, even when those decisions are published, binding precedent. *See* Wis. Stat. § 752.41(2); *State v. Hayes*, 2004 WI 80, ¶ 14 n.9, 273 Wis. 2d 1, 681 N.W.2d 203. And it does not matter that the opinions in *Mullen* and *Brady* were court of appeals opinions and this case involves a decision of this Court. The court of appeals' published decisions bind every court in this state, including this one. *Hayes,* 273 Wis. 2d 1, ¶ 14 n.9.

Further, this Court has never held that *Cook*'s principles overruled or modified the law-of-the-case doctrine as explained in *Mullen* or *Brady* or other cases. Rather, this Court has relied on *Brady* when discussing the law of the case in decisions postdating *Cook*. *See, e.g., State v. Moeck*, 2005 WI 57, ¶ 25, 280 Wis. 2d 277, 695 N.W.2d 783; *Stuart*, 262 Wis. 2d 620, ¶ 24.

Indeed, the court of appeals in *Jensen II* recognized that it was not required to follow this Court's precedent to the extent that it conflicted with more-recent Supreme Court precedent. The court in *Jensen II* followed the Supreme Court's holding in *Giles* that the Confrontation Clause applies only to testimonial statements, though doing so meant deviating from *Jensen I*, 299 Wis. 2d 267, ¶ 12 n.5, and *State v. Manuel*, 2005 WI 75, ¶ 60, 281 Wis. 2d 554, 697

N.W.2d 811. *Jensen II*, 331 Wis. 2d 440, ¶¶ 24–26. The court reasoned that "the Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law, although it means deviating from a conflicting decision of our state supreme court." *Id.* ¶ 26 (citing *State v. Jennings*, 2002 WI 44, ¶ 3, 252 Wis. 2d 228, 647 N.W.2d 142). In that situation, following the United States Supreme Court's decision does not violate the *Cook* rule that prohibits the court of appeals from modifying this Court's decisions. *See Jennings*, 252 Wis. 2d 228, ¶¶ 17–19.[1]

Thus, the court of appeals was wrong to conclude that *Cook* required the circuit court to follow this Court's ruling in *Jensen I* that Julie's statements were testimonial. Instead, an exception to the law-of-the-case doctrine allowed it to revisit this Court's decision if there had been a change in controlling authority. As argued in the next section, there has been a change in controlling confrontation law that shows that Julie's statements were no longer testimonial. This Court should grant review to clarify that *Cook* does not prohibit a circuit court from revisiting a prior appellate ruling in the case, and instead, the law-of-the-case doctrine and its exceptions apply.

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[1] If the State is correct that *Bryant* and *Clark* effectively overruled *Jensen I*, then, arguably, *Jennings* required the circuit court to follow those decisions regardless of any law-of-the-case considerations. This Court has not addressed how *Jennings* applies when there is a prior appellate ruling in a case that conflicts with subsequently decided United State Supreme Court precedent. This case gives this Court the opportunity to address how *Jennings* interacts with the law-of-the-case doctrine, and that is another reason for this Court to grant the State's petition for review.

II. United States Supreme Court decisions since *Jensen I* have narrowed the definition of what makes a statement testimonial such that Julie's statements no longer meet the definition.

This Court should also grant review to conclude that changes in confrontation law since *Jensen I* show that the decision's conclusion that Julie's statements are testimonial is no longer good law. The circuit court was thus correct that it could revisit this Court's decision based on these changes in the law. And even if the court erred, this Court can revisit its earlier decision based on the changes. Either way, this Court should accept review and conclude that Julie's statements are no longer testimonial under current confrontation law.

A. *Jensen I* adopted a broad definition of testimonial based on then-current confrontation law.

Under *Crawford*, decided in 2004, the government cannot introduce testimonial statements against a defendant "unless the declarant is unavailable and the defendant has had a prior opportunity to [cross-]examine the declarant." *Jensen I*, 299 Wis. 2d 267, ¶ 15.

Crawford did not give a comprehensive definition of "testimonial." *Id.* ¶ 16. Instead, the Court provided three general formulations, only the third of which is relevant here. This formulation deems testimonial "[s]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* ¶ 17 (quoting *Crawford*, 541 U.S. at 51–52).

At the time this Court decided *Jensen I* in 2007, this Court and the United States Supreme Court had concluded that, under *Crawford's* third formulation, nonemergency statements to law enforcement were testimonial. Emergency

statements to law enforcement and statements to friends and family were not testimonial. *See Davis v. Washington*, 547 U.S. 813 (2006).), and *Manuel*, 281 Wis. 2d 554, ¶ 39.

Notably, in *Davis*, the Court defined testimonial using what has become known as the "primary-purpose test." The Court explained that statements to police are nontestimonial when the circumstances objectively indicate that "primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis,* 547 U.S. at 822. But when the circumstances show that there is no emergency, and that the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," then the statements are testimonial. *Id.*

In its decision in *Jensen I*, this Court considered this case law and other sources to conclude that Julie's statements were testimonial under *Crawford's* third formulation. *Jensen I*, 299 Wis. 2d 267, ¶¶ 20–25. The court adopted a "broad" definition of testimonial: "a statement is testimonial if 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." *Id.* ¶¶ 24–25 (quoting *United States v. Summers,* 414 F.3d 1287, 1302 (10th Cir. 2005)).

Applying this standard, this Court held that Julie's statements were testimonial. A reasonable person in Julie's position would have anticipated that the letter "would be available for use at a later trial." *Id.* ¶ 27. The letter's contents and the circumstances surrounding it "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.* This Court also concluded that, "[f]or many of the same reasons," Julie's voicemails to Kosman were testimonial. *Id.* ¶ 30. It agreed with the circuit court that they "were entirely

for accusatory and prosecutorial purposes," and Julie did not leave the voicemail for emergency reasons. *Id.*

B. The United States Supreme Court has narrowed the definition of "testimonial" since *Jensen I*, and this Court has adopted that definition.

Since this Court decided *Jensen I* in 2007, the Supreme Court has issued five decisions about the Confrontation Clause. Only two are relevant here: *Clark*, 135 S. Ct. 2173, and *Bryant*, 562 U.S. 344.[2] Those cases adopted a narrower definition of "testimonial" than used in *Jensen I*, which this Court has applied in its recent confrontation decisions.

In *Bryant*, a shooting victim identified his shooter while he was lying on the ground with a gunshot wound in response to questions from police officers responding to the shooting. *Bryant*, 562 U.S. at 349. This situation allowed the Court to give "additional clarification with regard to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* at 359 (quoting *Davis*, 547 U.S. at 822). The Court concluded, under *Davis*, that the primary purpose of victim's statement was to allow police to respond to an ongoing emergency, and thus, it was not testimonial. *Id.* at 359–78.

In its decision, the Court clarified that in *Davis*, it had not tried to identify all conceivable statements, even those in response to police questioning, that could be testimonial. *Id.*

[2] The other three decisions involve the admission of forensic testing results when the analyst who performed the testing does not testify. *See Williams v. Illinois*, 567 U.S. 50 (2012); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The

at 357. "[T]he most important instances" of testimonial statements implicated by the Confrontation Clause "are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Id.* at 358. In contrast, statements obtained in response to police questioning conducted with the primary purpose of responding to an ongoing emergency are not testimonial. *Id.*

But the Court recognized that "there may be *other* circumstances . . . when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* The Court emphasized that whether a statement is testimonial is objective and depends on the actions and motives of both the interrogator and the declarant. *Id.* at 367. This "combined inquiry" will best ascertain the conversation's primary purpose. *Id.*

Clark further refined the definition of testimonial. There, the Court concluded that a child's statement reporting abuse to his teachers did not meet the definition. *Clark*, 135 S. Ct. 2181–82. It explained that statements to people other than law enforcement, while not categorically excluded from the Sixth Amendment, are "much less likely" to be testimonial. *Id.* at 2181.

The Court said that, post-*Crawford*, it had "labored to flesh out what it means for a statement to be 'testimonial.'" *Id.* at 2179. It explained that it had announced the "primary purpose" test in *Davis*. *Id.* at 2179–80. And it "further expounded" on it in *Bryant*, where it held that a statement is testimonial where the "'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 2180 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). Whether the statements were

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opinions do not help resolve whether Julie's statements are testimonial.

made during an emergency and the formality of the situation are relevant factors to this determination. *Id.* The Court reiterated, as it had noted in *Bryant*, that a statement may be nontestimonial even if it was not made during an emergency. *Id.* at 2180.

The Court concluded in *Clark* that the victim's statements to his teachers were not testimonial because the victim made them as part of an ongoing emergency involving his abuse. *Id.* at 2181. The primary purpose of the conversation was not to gather evidence for prosecution. *Id.* The victim was young, and he was talking to his teachers, not the police. *Id.*

The Supreme Court's post-*Jensen I* refinement of the primary-purpose test requiring courts to focus on whether a declarant made a statement as a substitute for trial testimony is a significant change in confrontation law. While it is true that the Supreme Court used the phrase "primary purpose" in *Davis*, its definition of testimonial in that case is broader than the one the Court adopted later in *Clark* and *Bryant*. And that broader definition shows that this Court applied now-incorrect law in *Jensen I*.

In *Davis*, the Court said that a statement made in a response to police interrogation in a nonemergency situation is testimonial when its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In contrast, *Bryant* and *Clark* both say that, to be testimonial, statements must be obtained with the primary purpose to create a substitute for trial testimony. *Clark*, 135 S. Ct. at 2180; *Bryant*, 562 U.S. at 357. The latter is a much narrower test.

This Court's understanding in *Jensen I* of what constitutes a testimonial statement is broader than the primary purpose test explained in *Bryant* and *Clark*. Under *Jensen I*, any statement that could potentially be used in a

criminal investigation or prosecution is testimonial. In contrast, *Bryant* and *Clark* require that the circumstances show that the statement is meant to be a substitute for testimony. Hence, the definition of testimonial in *Jensen I* is at odds with the current law.

Jensen I's definition also conflicts with the Supreme Court's directive about what a court should consider when determining whether a statement is testimonial. In *Bryant*, the Court explained that courts should consider all the circumstances of the encounter and the statements and actions of the declarant and the interrogator. 562 U.S. at 367. In contrast, *Jensen I* instructs courts to take a much narrower view and consider only whether a reasonable person in the declarant's position would foresee whether the statement could be used in an investigation. *Jensen I*, 299 Wis. 2d 267, ¶ 25.

In conflict with subsequent case law, this Court in *Jensen I* rejected the State's argument "that the subjective purpose of the declarant is not important to the analysis." *Id.* The Supreme Court later held, however, that "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Bryant*, 562 U.S. at 360.

Moreover, *Bryant* and *Clark* both conflict with *Jensen I* about whether nonemergency statements to law enforcement can ever be nontestimonial. *Jensen I* implies that an emergency is the only way such a statement can be nontestimonial. *Jensen I*, 299 Wis. 2d 267, ¶¶ 19, 30. *Bryant* and *Clark*, in contrast, recognized that there could be nonemergency situations in which a declarant's primary purpose in making a statement is not to create a substitute

for trial testimony. *Clark*, 135 S. Ct. at 2180; *Bryant*, 562 U.S. at 366.

Finally, this Court has adopted the definition of testimonial from *Bryant* and *Clark* in recent decisions. *See State v. Reinwand*, 2019 WI 25, ¶ 24, 385 Wis. 2d 700, 924 N.W.2d 184; *State v. Nieves*, 2017 WI 69, ¶ 40, 376 Wis. 2d 300, 897 N.W.2d 363; and *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256. Thus, the Court is no longer applying the law it established in *Jensen I*.

C. The circuit court correctly held that Julie's statements were no longer testimonial under the narrowed definition.

The definition of testimonial has narrowed since *Jensen I*. The circuit court could revisit whether Julie's statements were testimonial based on this change in controlling authority. *See Stuart*, 262 Wis. 2d 620, ¶ 24. And the court correctly determined that Julie's statements were no longer testimonial under the narrowed definition.

This Court has distilled four factors for assessing whether a statement is testimonial from *Clark* and *Bryant*. These are: (1) the formality of the situation producing the statement, (2) whether the declarant makes the statement to law enforcement, (3) the age of the declarant, and (4) the context in which the declarant makes the statement. *Reinwand*, 385 Wis. 2d 700, ¶ 25; *Mattox*, 373 Wis. 2d 122, ¶ 32.

Under these factors, Julie's letter to Kosman was not testimonial. It was informal. Julie did not make it under oath or in response to police questioning. It was not akin to an affidavit created with the help of a government official.

While Julie addressed the letter to a law enforcement officer, he played no role in creating the letter. In addition, Julie had an ongoing relationship with Kosman, having

more than 40 contacts with him about harassing behavior since 1992 or 1993. (834:42, 51–52; 909:42, 51–56.) Kosman was as much an acquaintance or friend as a police officer. The letter thus was not the product of the typical police-victim interaction in a criminal investigation.

Julie's age is a neutral factor, since her being an adult did not make it more or less likely that the letter was testimonial. *Reinwand*, 385 Wis. 2d 700, ¶ 29.

Finally, context shows that the letter was nontestimonial. Julie addressed it to an officer who had been helping her deal with harassment for years. The letter was not the result of any police questioning; Julie did not even give the letter directly to Kosman. And, when she wrote it, there was no crime to report, just behavior that Julie thought was suspicious. The letter was not a substitute for testimony.

For similar reasons, Julie's remaining statements to Kosman—the voicemails and the later in-person statements—were also not testimonial. As the court of appeals' correctly noted, these later statements are "of the same nature" for confrontation purposes. (Pet-App. 7 n.4.) But the court of appeals was wrong that they were testimonial.

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.) 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 said 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 these conversations was not to create a substitute for trial testimony. They were informal discussions between two people who had an ongoing relationship. True, Julie made these statements to law enforcement, but they were not typical police-citizen interactions involving a criminal investigation. Julie "just needed someone to talk to." (R. 909:45.) Julie's statements were a product of her being scared and confused and needing reassurance from an authority figure who knew her situation and who had helped her before. They were not a deliberate or calculated attempt to accuse Jensen of anything, let alone build a criminal case against him. Indeed, Julie made the statements before the crime at issue. The purpose of testimonial statements is to "nail down the truth about past criminal events." *Davis*, 547 U.S. at 831. Julie's statements were not testimonial.

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Clark and *Bryant* narrowed the definition of testimonial, and this Court has adopted that changed definition. The circuit court correctly determined that this change allowed it to revisit this Court's ruling in *Jensen I* and conclude that Julie's statements were not testimonial. This Court should grant review and affirm that decision.

III. Should this Court grant review and reverse the court of appeals, it should remand to let the court address the remaining issues.

Finally, if this Court grants the State's petition and reverses, it should remand to the court of appeals to address the remaining issues. Those issues are (1) whether the circuit court violated Jensen's constitutional rights by reinstating his judgment of conviction without a trial, and

(2) whether the circuit court violated the federal district court's order granting Jensen habeas relief by reinstating his conviction. The court of appeals did not reach these issues. This Court should allow it to address them in the first instance if it reverses on the issues presented in this petition. "In cases where this [C]ourt reverses the court of appeals and the court of appeals did not reach an issue, [this Court] will often remand the case for consideration of the issue not reached." *State v. Wilson*, 2015 WI 48, ¶ 86 n.15, 362 Wis. 2d 193, 864 N.W.2d 52.[3]

The State acknowledges that the court of appeals also did not address whether a change in the definition of testimonial justified the circuit court's determination that Julie's statements were no longer testimonial. The State still seeks review of this unaddressed claim for two reasons.

First, whether Julie's statements are nontestimonial is so closely related to the law-of-the-case issue that this Court should resolve both issues at the same time. Whether the circuit court could revisit *Jensen I* depends on whether there has been a change in the law. And whether Julie's statements are nontestimonial depends on the scope of the law's change. This Court should thus consider both issues at once.

Second, the court of appeals said that only this Court can say if *Jensen I* remains good law. If that is correct, and if the State is correct that that changes to confrontation law mean that Julie's statements are now nontestimonial, then

[3] There is no need to remand to let the court address Jensen's judicial-bias claim. While the court of appeals determined that its decision granting a new trial meant that it did not need to address the issue, the court also reaffirmed its decision from Jensen's direct appeal rejecting the claim on the merits. Thus, the court of appeals has resolved the claim against Jensen, and there is no reason for the court to address it further.

this Court is the only court that can say *Jensen I* is no longer good law. There would be no reason to remand to the court of appeals under this scenario.

As a final matter, the State notes that, although the court of appeals did not address Jensen's claim that the circuit court's reinstatement of the judgment of conviction violated the federal court's order, his argument is meritless. The district court that issued the order granting habeas relief concluded that the State complied with its terms. *Clements*, 2017 WL 5712690, at *3–7. The Seventh Circuit affirmed that decision. *Pollard*, 924 F.3d at 455–56. The federal courts were in the best position to interpret the federal order. This Court should defer to their decisions.

CONCLUSION

This Court should grant the State's petition for review, reverse the decision of the court of appeals, and remand to the court of appeals for further proceedings.

Dated April 17, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 7,457 words.

Dated this 17th day of April 2020.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 17th day of April 2020.

_____
AARON R. O'NEIL
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Mark D. Jensen
Case No. 2018AP1952-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of April 2020.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 17th day of April 2020.

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AARON R. O'NEIL
Assistant Attorney General