No. 11-148

In The

Supreme Court of the United States

MARVIN L. BEAUCHAMP,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

J.B. VAN HOLLEN
Attorney General
MAURA FJ WHELAN
Assistant Attorney General
WARREN D. WEINSTEIN*
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
whelanmf@doj.state.wi.us
**Counsel of Record*

QUESTION PRESENTED

Does the admission of unconfronted testimonial dying declarations against a criminal defendant violate the Sixth Amendment to the United States Constitution? (The Wisconsin Supreme Court answered: no.)

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OTHER AUTHORITY

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

Petitioner Marvin L. Beauchamp seeks review by writ of certiorari of *State of Wisconsin v. Beauchamp*, 2011 WI 27, 333 Wis. 2d 1, 796 N.W.2d 780 (Pet-Ap. 1a-54a). This case involves the application of the Confrontation Clause of the Sixth Amendment of the United States Constitution to Wis. Stat. § 908.045(3), the State of Wisconsin's dying-declaration exception to the general rule of hearsay exclusion. The State of Wisconsin is subject to the Sixth Amendment by virtue of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

On June 21, 2006, Byron Somerville was shot five times in the front yard of 3939 North Sherman Boulevard in Milwaukee.

Shortly after the shooting, Marvin Coleman, an emergency medical technician ("EMT") employed by the Milwaukee Fire Department, arrived on the scene. Coleman asked Somerville "who did this." Somerville answered: "Big Head Marvin." Somerville told Coleman that he had been inside the residence, and "had an argument with whoever [was] inside … he said that he was led outside where the person shot him as soon as he came out the door."

Officer Wayne Young was an officer on the scene assigned to ride with Somerville to the hospital. In the ambulance, Somerville told Young "he couldn't breathe, and he kept making a statement that a guy named Marvin shot him." Somerville made this statement spontaneously; he was not answering a question from Young or anyone else.

At the hospital trauma center, the attending physician said to Officer Young: "if you have any questions to ask him, you need to ask him now because he's not going to make it." In response to questions from Young, Somerville "stated that a guy name[d] Marvin shot him. I asked if he knew his last name. He stated he didn't…. He just gave me a description. The name was Marvin as being the dark skinned male with a bald head and a big forehead." Shortly thereafter, Somerville died.

Petitioner Marvin Beauchamp was identified as the shooter and charged with first degree intentional homicide in the death of Somerville.

Prior to trial, the State filed a motion in limine seeking admission of Somerville's hearsay statements as dying declarations. The circuit court ruled that (1) Somerville's statements were admissible under the dying-declaration exception to Wisconsin's hearsay rule (Wis. Stat. § 908.045(3)), and (2) the statements were "exempt" from the requirements of the Confrontation Clause.

Beauchamp appealed to the Wisconsin Court of Appeals. On the confrontation issue, the court

concluded that this Court's statement in *Giles v. California*, 554 U.S. 353 (2008), that unconfronted dying-declaration hearsay was admissible at common law was "binding" "dictum." *State of Wisconsin v. Beauchamp*, 2010 WI App 42, ¶12, 324 Wis. 2d 162, 781 N.W.2d 254 (Pet-Ap. 64a-65a). Accordingly, it held that Somerville's statements were admissible at Beauchamp's trial.

Beauchamp filed a petition for review with the Wisconsin Supreme Court. The supreme court granted the petition and affirmed the ruling of the court of appeals. Unlike the court of appeals, the supreme court did not simply rely on the *Giles* dictum.

The supreme court noted that the admission of unconfronted dying-declaration hearsay had been generally allowed before, during, and after the adoption of the Bill of Rights. The court concluded that because the exception for admitting unconfronted dying declarations "is so deeply rooted in the common law," their continued admission does not violate the Confrontation Clause. The court noted that this conclusion was not only consistent with the dictum of *Giles*, but consistent also with the historical approach employed by this Court in *Crawford* and *Giles*. *See Beauchamp*, 796 N.W.2d 780, ¶¶24-28 (Pet-Ap. 22a-26a).

Before the supreme court, Beauchamp acknowledged the long-standing admissibility of unconfronted dying declarations. However, he argued that the traditional rule was based on a

religiously based presumption of the inherent reliability of dying declarations, a presumption that was antiquated in our increasingly secular society. The supreme court did not disagree with this observation, but noted that psychological factors at the moment of death may have the same effect as religious beliefs and that, as recognized since the nineteenth century, the doctrine of necessity also justified the trial use of dying declarations. For these reasons, the court concluded that the continued admissibility of unconfronted dying declarations despite any arguable change in American religious beliefs was justified.

Beauchamp also argued that dying declarations may be unreliable because the speaker may be mistaken, motivated by malice, or cognitively impaired. The supreme court responded that "[t]he fairest way to resolve the tension between the State's interest in presenting a dying declaration and a defendant's concerns about its potential unreliability is not to prohibit such evidence, but to continue to freely permit . . . the aggressive impeachment of a dying declaration on any grounds that may be relevant in a particular case." *Beauchamp*, 796 N.W.2d 780, ¶45 (Pet-Ap. 39a).

The supreme court also noted that, beginning with *People v. Monterroso*, 101 P.3d 956 (Cal. 2004), every published state appellate opinion to confront the issue had "decline[d] to hold that the constitutional right to confront witnesses is violated by the admission of statements under the dying declaration hearsay exception." *Beauchamp*, 796

N.W.2d 780, ¶34 (Pet-Ap. 30a). The court found no reason, in either this Court's precedents or the arguments advanced by Beauchamp, to part company with the other state courts.

Petitioner Beauchamp now seeks certiorari review in this Court.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE WISCONSIN SUPREME COURT'S DECISION IN THIS CASE AND THE OTHER FIFTEEN PUB-LISHED APPELLATE STATE COURT DECISIONS ON THE QUESTION PRESENTED.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that the Confrontation Clause of the Sixth Amendment bars the use of unconfronted "testimonial" hearsay statements at criminal trials.

The Court determined that the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 53-54. In other words, only if a

specific type or category of testimonial hearsay was admitted in criminal trials at common law would it be admissible under the Confrontation Clause. However, if such testimony was not admitted in criminal trials at common law, it would not be admissible under the Confrontation Clause.

Crawford was a watershed decision that abrogated the test for admitting unconfronted hearsay statements established nearly twenty-five years earlier in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* premised the admissibility of unconfronted hearsay on its reliability. *See id.* at 65-66. *Crawford* rejected the reliability approach in favor of a strict historical approach. In *Giles*, 554 U.S. at 358-65, this Court reiterated that history is the touchstone of Confrontation Clause analysis.

The Court noted in *Crawford* that "one deviation" from the general rule of mandatory confrontation involves "dying declarations." *Crawford*, 541 U.S. at 56 n.6. "The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." *Id.* (citations omitted). In *Giles*, the Court again noted that "declarations made by a speaker who was both on the brink of death and aware that he was dying" "were admitted at common law even though they were unconfronted." *Giles*, 554 U.S. at 358. However, these observations were dicta. The Court did not, in either *Crawford* or *Giles*, decide whether dying declarations are exempt from Confrontation Clause requirements. *See*

Michigan v. Bryant, 131 S. Ct. 1143, 1177 (2011) (Ginsburg, J., dissenting).

Since *Crawford*, sixteen state appellate courts (including the Wisconsin Supreme Court) have addressed the unconfronted dying-declaration hearsay question in published opinions. These courts have unanimously held that the Confrontation Clause incorporates a common law exception for unconfronted dying-declaration hearsay. Therefore, they have concluded, the criminal-trial use of such testimony does not violate the Confrontation Clause and is permissible under *Crawford*. *See People v. Monterroso*, 101 P.3d 956, 765 (Cal. 2004); *Cobb v. State*, 16 So.3d 207, 212 (Fla. Dist. Ct. App. 2009); *People v. Gilmore*, 828 N.E.2d 293, 302 (Ill. App. Ct. 2005); *Wallace v. State*, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005); *State v. Jones*, 197 P.3d 815, 822 (Kan. 2008); *Com. v. Nesbitt*, 892 N.E.2d 299, 310-11 (Mass. 2008); *People v. Taylor*, 737 N.W.2d 790, 795 (Mich. Ct. App. 2007); *State v. Martin*, 695 N.W.2d 578, 585-86 (Minn. 2005);[1] *State v. Minner*, 311 S.W.3d 313, 323 & n.9 (Mo. Ct. App. 2010); *Harkins v. State*, 143 P.3d 706, 711 (Nev. 2006); *People v. Clay*, 926 N.Y.S.2d 598, 609 (N.Y. App. Div. 2011); *State v. Calhoun*, 657 S.E.2d 424, 427-28 (N.C. Ct. App. 2008); *State v. Lewis*, 235 S.W.3d 136, 147-48 (Tenn. 2007); *Gardner v. State*, 306 S.W.3d 274, 289 & n.20 (Tex. Crim. App. 2009); *Satterwhite v. Commonwealth*, 695 S.E.2d 555, 568 (Va. Ct. App. 2010).

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[1]*Abrogated on other grounds*, *Davis v. Washington*, 547 U.S. 813 (2006).

These state court decisions have rested on one or both of two foundations. The first is that this Court's dicta in *Crawford* and *Giles*—that unconfronted dying-declaration hearsay was admissible at common law—is determinative. The second basis is a rigorous and independent application by the state court itself of *Crawford*'s historical rationale to dying-declaration hearsay. *See*, *e.g.*, *Minner*, 311 S.W.3d at 322-23 & n.9 (relying on *Crawford* and *Giles* dicta); *Satterwhite*, 695 S.E.2d at 560-68 (independently applying historical analysis); *Nesbitt*, 892 N.E.2d at 310-12 (noting *Crawford* dicta and conducting independent historical analysis). In *Beauchamp*, the Wisconsin Supreme Court conducted an independent historical analysis.

Due to the lack of conflict and overwhelming consistency of analysis in the state court decisions, only one side of the question presented has been fully developed in the lower courts. To date, there is no published, clearly articulated judicial analysis of the interplay between dying-declaration hearsay and the Confrontation Clause that has led to the conclusion that the Clause bars the hearsay. If this Court wishes to address the present question, it should wait for a case reaching a conclusion contrary to the sixteen cases that have examined the question so far. Then, the Court will be able to begin its consideration of the question with the benefit of fully developed judicial reasoning on both sides of the issue.

For this reason, the writ should be denied.

II. PETITIONER HAS FAILED TO ARTICULATE AN ARGUMENT DEMONSTRATING THAT THE WISCONSIN SUPREME COURT DECIDED THIS CASE INCORRECTLY.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner Beauchamp has the duty to set forth the compelling reasons why this Court should grant him a writ of certiorari. He has failed to do so.

Petitioner Beauchamp states a single reason for granting the writ: "Whether testimonial dying declarations are an exception to the Confrontation Clause is an important question that has not been, but should be, settled by this Court." Petition at 8.

On its face, the question presented is compelling. However, Petitioner Beauchamp fails to suggest an answer to the question he presents. Sixteen appellate state courts have answered this question affirmatively. *See supra* at 7-8. They have set forth the reasons for their conclusions. *See supra at* 8. Petitioner Beauchamp does not address the courts' conclusions or their reasoning. He does not explain why their conclusions were wrong or how their reasoning was flawed. Indeed, he does not even assert that their conclusions or reasoning were wrong or flawed. Remarkably, he does not even tell this Court the relief he seeks should the Court grant the writ. Should the Wisconsin Supreme Court's

opinion be reversed or affirmed? Petitioner Beauchamp does not say.

This Court should deny the writ because it does not appear that Petitioner Beauchamp is prepared to present an effective argument for why the Wisconsin Supreme Court's decision should be reversed. Above, the State of Wisconsin argued that, if it wishes to address the question presented, this Court should wait for a case from a lower court that has reached a conclusion different from the sixteen state courts that have previously considered the issue. A contrary decision, the State reasoned, will provide the Court with the benefit of fully developed judicial reasoning on both sides of the question. Similarly, the Court should not grant a writ in a case in which the Petitioner has failed to develop an argument showing why the decisions by the Wisconsin Supreme Court and the other fifteen state courts were wrong on the law, or how the reasoning of their opinions was flawed.

Petitioner Beauchamp has not even attempted to present a coherent argument concerning the constitutional admissibility of unconfronted dying-declaration hearsay after *Crawford*. A Petitioner who fails to present a developed argument in his Petition for a Writ of Certiorari is unlikely to present one in a brief on the merits. For this reason, the writ should be denied.

III. THE ALLEGED ERROR WAS HARMLESS.

Even if the Wisconsin Supreme Court erred in holding that the criminal-trial use of unconfronted testimonial dying declarations does not violate the Confrontation Clause, the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

The circuit court issued a ruling in limine allowing the State to use at trial three statements from Somerville: (1) his statement to EMT Coleman on the scene; (2) his statement to Officer Young in the ambulance; and (3) his statement to Officer Young in the hospital emergency room.

For reasons not disclosed in the record, the State did not use statement (2) at trial.

The State concedes that, under existing case law, statement (3) was an unconfronted testimonial statement.

Statement (1), Somerville's statement on the scene to EMT Coleman, would be admissible under *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). The statement to Coleman was non-testimonial, and thus not barred by the Confrontation Clause. [2]

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[2]The State of Wisconsin made the *Bryant* argument for the first time in the Wisconsin Supreme Court. In the Wisconsin Court of Appeals, the State assumed but did not concede that the Coleman statement was testimonial. It was not until this Court granted certiorari in *Michigan v. Bryant* that the State concluded it could make a good-faith argument on the

Briefly, the facts in *Bryant* were these: police officers arrived at a gas station where a shooting victim, Anthony Covington, lay mortally wounded. The officers asked Covington what had happened, who had shot him, and where the shooting took place. Covington said "Rick" shot him, and described the location and circumstances of the shooting. *Bryant*, 131 S. Ct. at 1150. The facts of the present case are similar: EMT Coleman arrived at the front yard of a residence where a shooting victim, Somerville, lay mortally wounded. Coleman asked Somerville who shot him. Somerville said "Big Head Marvin did it," and described the location and circumstances of the shooting.

The *Bryant* Court held that "the circumstances of the interaction between Covington and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.'" *Id.* at 150 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). Therefore, Covington's statements were not

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"testimonial" question. The State briefed the issue in the supreme court after briefing and oral argument in *Bryant* but before the Court's final decision in that case. According to Wisconsin appellate practice, the respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling, *see*, *e.g.*, *State v. Smith*, 2009 WI App 104, ¶7, 320 Wis. 2d 563, 770 N.W.2d 779, and an appellate court "may review the record to determine if a statement is admissible under a particular hearsay exception even though the trial court did not admit the statement on that basis." *State v. Kutz*, 2003 WI App 205, ¶33, 267 Wis. 2d 531, 671 N.W.2d 660.

testimonial and their admission at Bryant's trial did not violate the Confrontation Clause.

The Court explained the "primary purpose/ongoing emergency" doctrine as follows:

> [W]hen a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Bryant, 131 S. Ct. at 1162 (footnote omitted).

There was clearly an ongoing emergency in *Bryant*. Covington had been shot with a gun. The police did not know where the shooter had gone or whether he posed a continuing danger to the victim, law enforcement, or the public. *Id.* at 1163-64. "At

bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington." *Id.* at 1164.

The "ultimate inquiry is whether the 'primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency.'" *Id.* at 1165 (original punctuation simplified). The Court looked at the motives of both Covington and the police to determine the "primary purpose of the interrogation." Due to the gravity of the wounds that would ultimately kill him, the Court doubted that Covington's primary purpose in answering the officers' questions was to secure Bryant's conviction. *Id.* at 1165. Because the police did not know the whereabouts or motive of the shooter when they first questioned Covington, their primary purpose was to meet and contain the ongoing emergency, not to develop evidence for trial. *Id.* at 1166-67. Furthermore, "the informality [of Covington's interrogation] suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements." *Id.* at 1166.

Somerville's statement to EMT Coleman tracks the *Bryant* facts very closely. Somerville, like Covington, was a shooting victim. As in *Bryant*, the

police did not know where the shooter had gone and did not know whether he posed a continuing danger to Somerville, the police, or the public. Like Covington, Somerville was gravely wounded, so it is doubtful that his purpose in answering Coleman's questions was to secure Beauchamp's conviction. This Court concluded that the primary purpose of the police in *Bryant* was to meet and contain the ongoing emergency, not to develop evidence for trial. This is even truer in this case. Because Coleman was a Fire Department EMT, the likelihood that his primary purpose in questioning Somerville was prosecutorial or accusatorial is extremely small. Finally, this "interrogation" was as informal as that in *Bryant*.

Concurring in the court below, Chief Justice Abrahamson concluded that the Coleman statement was non-testimonial under *Bryant* and thus admissible. *Beauchamp*, 796 N.W.2d 780, ¶¶97-98 (Abrahamson, C.J., concurring) (Pet-Ap. 53a). Therefore, because Somerville's statement to Coleman was admissible, even "if the victim's statements to Officer Young were testimonial hearsay and even if the dying declaration exception is not recognized, the admission of Young's testimony was harmless error." *Id.* ¶98 (Abrahamson, C.J., concurring) (Pet-Ap. 54a).

As shown, Somerville's statement to Coleman was non-testimonial under *Bryant*. Its admissibility is thus subject to the hearsay rules of the State of Wisconsin. *See Bryant*, 131 S. Ct. at 1167. That is not a question for this Court.

In addition to the admissible testimony from EMT Coleman, the State presented evidence from fourteen other witnesses to prove Beauchamp's guilt. William Stone, a jailhouse informant, testified that Beauchamp admitted to shooting Somerville. Two women who knew both men and were present at the time of the shooting identified Beauchamp as Somerville's shooter. These women, Dominique Brown and Shaniya Brookshire, gave detailed statements to the police prior to trial. They recanted these statements at trial, but their prior inconsistent statements were admitted into evidence. Jerrod Logan, a young man who watched the shooting from a nearby median strip, substantially corroborated Brown and Brookshire's pretrial statements. Taken together, this evidence shows beyond a reasonable doubt that a rational jury would have convicted Beauchamp without Somerville's dying declaration to Officer Young.

This Court should deny the writ because the alleged error was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons discussed above, respondent State of Wisconsin requests that this Court deny the petition for writ of certiorari to the Wisconsin Supreme Court.

Dated this 24th day of October, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

MAURA FJ WHELAN
Assistant Attorney General

WARREN D. WEINSTEIN*
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 266-9594 (Fax)
whelanmf@doj.state.wi.us
**Counsel of Record*