IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO, Plaintiff-Appellant, -vs- GARRY F. SMITH, Defendant-Appellee.	Case No. 23-1289 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals No. 111274

MERIT BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecutors' ability to secure justice for victims and sponsors legal education programs that encourage best practices in law enforcement and community safety.

In light of these considerations, OPAA has significant concerns with the approach of some Eighth District panels towards the question of what is "testimonial" for purposes of the Sixth Amendment right to confrontation in the context of domestic-assault cases. These panels, including in the present case, reflect an antipathy toward the introduction of out-of-court statements, using pejoratives like "abhorrent" and "reprehensible" to describe the use of such statements when the victim does not testify. But this is a *threshold* matter as to the right of confrontation. If the out-of-court statement is not testimonial, the Confrontation Clause is inapplicable altogether. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007). "Only testimonial hearsay implicates the Confrontation Clause." *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, ¶ 214. The Eighth District's pejoratives assuming the applicability of that right are out of place. Courts should be agnostic rather than antagonistic on the threshold question of whether a statement is "testimonial."

The Eighth District majority's desire to enforce its personal preferences can be seen at work when the majority contended below that "the exceptions to live witness testimony authorized in *Davis*, *Bryant* and their progeny were not intended to enable

prosecutors to make tactical decisions not to bring in a victim (or alleged victim) to testify at trial to avoid subjecting his or her testimony to scrutiny under cross-examination." *State v. Smith*, 2023-Ohio-603, 209 N.E.3d 883, ¶ 96. In fact, those "exceptions" *are* intended, *exactly*, to allow the prosecutor to introduce non-testimonial statements without the need for live testimony from the declarant. The Eighth District majority disfavors that constitutional judgment, contending that "[w]e recognize that some prosecutions can go forward without a 'victim' but that should be the exception and not the rule." *Smith*, ¶ 100. But, as a matter of law, the "rule" is that the right to confrontation does not apply to non-testimonial statements and therefore *allows* the admission of such statements. The Eighth District's presumptive antagonism toward out-of-court statements stands this legal doctrine on its head.

The panel's antipathy toward constitutionally-admissible out-of-court statements also takes an unusual turn into an antipathy toward body-camera evidence as well. The accurate recording of out-of-court statements should be welcomed by all, but, per another Eighth District panel in *State v. Jones*, 2023-Ohio-380, 208 N.E.3d 321, ¶ 129 (8th Dist.), that particular benefit of body-cam recording is a seemingly inappropriate extension of the use of body cameras. According to *Jones*:

> The purpose of body cameras is to record events in which law enforcement officers are involved to improve officer safety, increase evidence quality, reduce civilian complaints and reduce agency liability, * * * – not to supplant the in-court testimony of witnesses. Out-of-court statements that would otherwise be inadmissible do not become admissible simply because they were captured on a police body camera. Under circumstances like those here, statements recorded by police body cameras cannot be used either to supplement the testimony of a witness or as a substitute for the testimony of a witness.

Jones, ¶ 129 (citation omitted). The *Smith* panel echoed these views. *Smith*, ¶ 94.

It is true enough that an out-of-court statement does not become admissible merely because it was recorded, but, likewise, it does not become inadmissible for that reason either. Moreover, body-cam-recorded statements *can* be admissible if non-testimonial and *can* thereby "supplant" a need for live testimony in that respect. And, contrary to *Jones*, even a testimonial out-of-court statement *can* be used "to supplement the testimony of a witness" at trial since the witness-declarant would be subject to cross-examination regarding the out-of-court statement. *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004), citing *California v. Green*, 399 U.S. 149, 162 (1970). When a body-cam recording captures admissible statements, the recording is usable just as much as oral testimony recounting those statements, and the Eighth District's apparent complaint about the use of body-cam recordings is a non-sequitur.

Beyond these legally-flawed notions, the majority below gave short shrift to the context of domestic violence by downplaying the "emergency" nature of these events. The victim had serious injuries after the 3-21-20 attack, as depicted in the video showing her severely-swollen face. *Smith*, ¶ 21. The victim had a significantly-complicating medical component to her injuries, being noticeably pregnant and expressing her concerns about the lack of movement of her unborn child. Id. ¶ 22. The medical emergency was continuing even as EMTs were beginning to assess her in the ambulance, which, in their determination, required a trip to the hospital. It was early in that assessment when the officer asked about the nature of the attack, which can be easily justified in relation to the ongoing medical emergency and the need to understand how

severe her injuries and the injuries to the unborn child might be. And asking questions about the identity of the attacker and their living arrangements were necessary to discern and remove the danger posed by the defendant who might return to their home if she went back there. The victim mentioned two additional dangers: the defendant was very intoxicated and was driving, see id. ¶ 22, 23; and part of the defendant's attack had included threatening to shoot and kill her. Id. ¶ 23. She later disclosed at the hospital that he had a gun on him. Id. ¶ 26.

It is hard to think of these events as not creating an emergency in terms of the victim's medical needs and in terms of the need to arrest the defendant so that he no longer posed a grave danger to the victim or to those endangered by his drunk driving. A drunken domestic abuser was on the loose and on the roads – and this qualified as an emergency on multiple levels. The same logic that prompted the court to impose a no-contact order later (*Smith*, ¶ 4) also justified obvious initial concerns that the defendant must be found so that he would not be able to gain access to the victim.

It all bespeaks the larger picture of domestic abuse and helps to explain the eventual no-show status of the victim at trial. This Court has acknowledged the "cycle of violence." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶¶ 162-64; *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 93. The "cycle of violence" is well known:

> {¶ 55} * * * Heller explained that abuse in intimate relationships usually follows a pattern known as the "cycle of violence." (Tr. at 503.) She identified the first phase as the "tension building" phase, during which there is a lot of arguing and the victim is "walking on eggshells." Id. That phase "moves into" a violent episode or incident, during which, "there is a great deal of intimidation and threatening behavior or the victim is actually physically or sexually assaulted." Id. "From there, it moves into" the "honeymoon

> phase," where the perpetrator may initially apologize, but, eventually, this "becomes less of an apology on the part of the perpetrator of domestic violence and more of a blaming of the victim." Id. at 504. Heller discussed the "power and control wheel," which identified tactics and methods the abuser will utilize to gain power and control. Id. at 506. Such behaviors included: visual intimidation, destruction of property or something of significance to the victim, the use of threats and coercion, including threats with a weapon and threats against the victim's family and friends, financial exploitation, verbal and emotional harassment, blaming the victim, and isolating the victim. Id. at 506-512. She also explained that domestic violence "occurs on a continuum," thus, while it may start out with "verbal and psychological abuse," it tends to "move into more physically violent behaviors," and can also include "sexually abusive behaviors." Id. at 512. According to Heller, a victim may not disclose what is going on because "they're embarrassed and ashamed," and may stay in an abusive relationship out of fear for themselves, their family, and friends. Id. at 513. In fact, Heller noted that fear was the "biggest reason" why a victim stays in the relationship. Id. at 514.

State v. Drew, 10th Dist. No. 07AP-467, 2008-Ohio-2797, ¶ 55.

While the Eighth District majority expressed the wish that no-show domestic victims should be held "accountable" through the issuance of a bench warrant, see *Smith*, ¶ 99, the prosecutor's reticence to seek the arrest of this victim is understandable. The defendant is a serial abuser; the victim's fear is understandable; and the prosecutor reasonably would not want to make things worse for the victim. It was known that the defendant had a prior 2012 conviction for domestic violence against this victim. *Smith*, ¶¶ 3, 5, 17. He had pummeled the victim in the 3-21-20 attack and threatened to shoot and kill her in that attack. He had brazenly violated the no-contact order from the first case by attacking the victim again on 12-26-20, this time repeatedly pistol-whipping her with a gun. Id. ¶ 33, 36, 37, 44. One officer described the victim's injuries after the 12-

26-20 attack as probably the worst DV he had ever seen. Id. ¶ 40. And it was known by the time of trial that the defendant had made *hundreds* of phone calls from the jail to phone numbers associated with the victim, see id. ¶ 13 n. 2, a number of calls which can be seen as harassment seeking to exert power and control over the victim. It was all consistent with the cycle of violence, and the victim likely understood what the next violent step could be if she testified. The Eighth District's demand for bench warrants strikes one as tone deaf.

Instead of seeking to arrest the victim, the prosecutor could adopt a more-nuanced approach. The prosecutor could seek the admission of her out-of-court statements, which had substantial non-testimonial aspects and therefore would be admissible without her live testimony and without violating the constitutional right to confrontation. Far from being an "absurdity", "reprehensible", "abhorrent", and "disturbing", see *Jones*, ¶ 151; *Smith*, ¶ 95; *State v. Johnson*, 2023-Ohio-445, 208 N.E.3d 949, ¶¶ 80-81 (8th Dist.), this permissible approach complies with constitutional standards.

Moreover, "the familiar, standard rule [is] that the prosecution is entitled to prove its case by evidence of its own choice * * *." *Old Chief v. United States*, 519 U.S. 172, 186 (1997); *United States v. Moore*, 954 F.2d 379, 381 (6th Cir.1992) ("Sixth Amendment does not * * * require the government to call every witness competent to testify"). "The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial." *United States v. Bahna*, 68 F.3d 19, 22 (2nd Cir.1995). "[I]t seems clear that a prosecutor has no duty to call all the witnesses he has subpoenaed, and may exercise his own judgment concerning the

witnesses to be called and the testimony to be presented." *United States v. Harper*, 460 F.2d 705, 706 (5th Cir.1972). "[T]here is no rule the government must call every witness it identified before trial." *United States v. Jones*, 74 F.4th 941, 952 (8th Cir.2023).

The Eighth District's pejoratives notwithstanding, it is entirely *consistent* with the constitutional right to confrontation that the victim might not need to testify in a given case and that her non-testimonial statements will be used by the State. The Eighth District's harsh criticisms miss the mark, particularly in the context of domestic violence.

In any event, those criticisms are grounded in a misapplication of the standard for determining what is "testimonial." As stated by the dissenter in *Johnson*, ¶ 107, some Eighth District panels are seeking to "redefine" the right-to-confrontation analysis:

> {¶107} Of particular concern as to the constitutional analysis, by redefining the bounds of what constitutes an ongoing emergency through a common dictionary definition, the majority has jettisoned a decade of legal authority. The outer bounds of what is considered an "ongoing emergency" *is purposely not defined* and is instead based on a "highly context-dependent inquiry." *Bryant*, 562 U.S. at 363, 131 S.Ct. 1143, 179 L.Ed.2d 93. "[T]he Supreme Court has never defined the scope or weight of the 'ongoing emergency.'" *Woods v. Smith*, 660 Fed.Appx. 414, 428 (6th Cir.2016). Courts should not take the Supreme Court's reluctance to provide an exhaustive definition of the term lightly, nor should an intermediate state court necessarily be redefining the scope of federal rights.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State's appeal.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's merit brief.

ARGUMENT

> **Amicus Proposition of Law**: The primary purpose of the statements from a domestic violence victim were not intended as substitutes for trial testimony but rather to meet an ongoing emergency. The arrival of the police and the fact that the suspect was not on scene did not render the victim's statements testimonial.

Under *Crawford v. Washington*, the Confrontation Clause bars the admission of "testimonial" out-of-court statements, unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 59. The key question is whether the out-of-court statement is testimonial. If the statement is non-testimonial, the right to confrontation is inapplicable altogether.

Since *Crawford* was decided in 2004, the case law has developed a "primary purpose" test in assessing whether the out-of-court statement was made with a primary purpose of creating an out-of-court substitute for trial testimony. Although statements to law enforcement officers can qualify as "testimonial", statements during an ongoing emergency, even to law enforcement officers, will not be considered "testimonial".

In *Ohio v. Clark*, 576 U.S. 237 (2015), the Court summarized the line of cases from *Crawford* onward in addressing when a statement will be deemed "testimonial." The *Clark* Court concluded that, [i]n the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 576 U.S. at 245, quoting

Michigan v. Bryant, 562 U.S.344, 358 (2011).

A.

A threshold problem with the Eighth District's approach arises from its mistake in placing the burden on the State to prove that the statements were not testimonial. *Smith*, ¶ 86. The burden of establishing the facts supporting the applicability of a claimed constitutional right is usually on the proponent of that claim. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 349 (1944). Regardless of whether the constitutional challenge is facial or as-applied, "the invalidity of the challenged law must be demonstrated * * *." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1127 (2019). When a defendant raises a constitutional objection to evidence that is otherwise admissible under state-law evidence rules, he is raising an as-applied constitutional challenge to the validity of the evidentiary rule(s) that would allow the admission of that evidence, and the threshold burden of demonstrating the "testimonial" nature of the statement should fall on the defendant. See, e.g., *State v. Gaines*, 6th Dist. No. L-22-1102, 2023-Ohio-2243, ¶ 29 (requiring defendant to show undue suggestiveness based on constitutional objection to out-of-court identification).

As stated by Justice Scalia, a defendant making a confrontation objection would have a threshold burden to establish that the out-of-court statement is "testimonial". "Defendants may invoke their Confrontation Clause rights once they have established that the state seeks to introduce testimonial evidence against them in a criminal case without unavailability of the witness and a previous opportunity to cross-examine. The burden is upon the prosecutor who seeks to introduce evidence *over* this bar to prove a long-established practice of introducing *specific* kinds of evidence, such as dying

declarations, * * * for which cross-examination was not typically necessary." *Ohio v. Clark*, 576 U.S. 237, 253 (2015) (Scalia, J., concurring) (emphasis sic; citation omitted). The right to confrontation does not presumptively apply to every out-of-court statement: "We have never suggested * * * that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case." *Clark*, 576 U.S. at 250-51 (majority). Constitutional rights are important, but it is just as important to get it right when the particular constitutional right does *not* apply as it is to get it right in determining when it does apply.

B.

In *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, this Court discussed the nuances of what constitutes "testimonial" evidence in relation to statements made to the police, addressing the important distinction between statements made during an ongoing emergency and statements made when the police are only gathering evidence.

> {¶ 148} In *Michigan v. Bryant*, __U.S.__, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93 (2011), the court provided further explanation of the "ongoing emergency" discussed in *Davis*. In *Bryant*, police officers responding to a shooting call found the victim, Anthony Covington, lying on the ground with a gunshot wound. *Id.* at 1150. Police officers asked Covington "'what had happened, who had shot him, and where the shooting had occurred.'" *Id.*, quoting *People v. Bryant*, 483 Mich. 132, 143, 768 N.W.2d 65 (2009). Replying that "Rick" (the defendant) had shot him, Covington told the police that he had gone to Rick's house and had a conversation with him through the back door. *Id.* Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station where the police found him. *Id.* Covington died within hours. *Id.* At trial, police officers who spoke with Covington testified about what Covington had told them. *Id.* The perpetrator was at large.

> {¶ 149} The United States Supreme Court held that Covington's identification and descriptions of Bryant and the location of the shooting were nontestimonial statements because the primary purpose of the statements was to enable police to meet an ongoing emergency. *Bryant* at 1166-1167. In reaching its decision, the court provided further clarification of the "ongoing emergency" circumstance that occurs in the context of a nondomestic dispute that "extends beyond an initial victim to a potential threat to the responding police and the public at large." *Id.* at 1156.
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> {¶ 150} *Bryant* emphasized that in assessing whether a statement is testimonial in such a case, the ultimate inquiry focuses on whether the primary purpose of the interrogation is to meet an ongoing emergency or to establish past events for later criminal prosecution. *Id.* at 1156-1157. In such an inquiry, a court must "objectively evaluate the circumstances in which the encounter occur[red] and the statements and actions of the parties." *Id.* at 1156. The focus is not on the subjective or actual purpose or intent of the interrogator or the declarant, but on "the purpose that reasonable participants would have had" under the same circumstance. *Id.* The court cautioned that the focus must be on the perspective of the parties at the time of the interrogation, and not based on hindsight, for "[i]f the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause." *Id.* at 1157, fn. 8.

As stated in *Jones,* the involvement of an "emergency" is highly dependent on context.

Jones, ¶ 151. As further stated in *Jones*:

> {¶ 153} The court stressed that "whether an ongoing emergency exists is simply one factor – albeit an important factor – that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." [*Bryant*] at 1160.
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> {¶ 154} Another factor involves the informality of the encounter, because "formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past

> events potentially relevant to later criminal prosecution.'" *Id.*, quoting *Davis* at 822. In *Bryant*, the police encountered a "fluid and somewhat confused" situation. *Id.* at 1166. Their questioning lacked formality because it "occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion." *Id.* at 1160.
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> {¶ 155} The court also stated that "the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." *Id.* The court stated, "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers." *Id.* at 1160-1161. Additionally, the court stated, "Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is * * * the approach most consistent with our past holdings." *Id.* at 1162.

In *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, this Court recognized that statements made by a bleeding gunshot victim fell within an "emergency":

> {¶ 181} Although admissible under the hearsay rules, these statements must also be evaluated under the Confrontation Clause. The Confrontation Clause applies only to "testimonial statements." *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, ¶ 59. A statement is testimonial if it is made with "'a primary purpose of creating an out-of-court substitute for trial testimony.'" *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 87, quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).
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> {¶ 182} With respect to Davis's statements to Schockling, whether a statement to a person who is not a law-enforcement officer is testimonial depends on the expectations of the declarant: would the declarant have reasonably believed that the statement would be available for later use at trial? *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 161. A truly excited utterance is unlikely ever to meet this standard; certainly an

> objective observer would not believe that when Davis, scared, bleeding, and in shock, sought help from strangers, he expected his statements to be available for use at trial. *See id.* at ¶ 162-163.
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> {¶ 183} Davis's statements to Sheriff Hannum are also nontestimonial. Statements to police officers responding to an emergency situation are generally considered nontestimonial precisely because the declarant is usually acting – under great emotional duress – to secure protection or medical care. *See State v. Knecht*, 12th Dist. Warren No. CA2015-04-037, 2015-Ohio-4316, 2015 WL 6125747, ¶ 24–25 (victim's statement to responding police officers that her husband beat her was nontestimonial); *State v. McKenzie*, 8th Dist. Cuyahoga No. 87610, 2006-Ohio-5725, 2006 WL 3095671, ¶ 17 (victim's statement was nontestimonial because her primary purpose was to alert police to an ongoing emergency).

C.

In the present case, the non-testimonial aspects predominate in the verbal exchange between the police and the victim. The police questions were basic and by all indications were meant to develop an outline of the nature of the attack in order to assess the seriousness of the situation. The exchange was occurring in an ambulance in the presence of non-law-enforcement EMTs as the victim was just beginning to be assessed for her medical conditions, which were plainly serious. The victim had been pummeled to the point of having a severely-swollen face, and she was pregnant, thereby heightening the potential for medical complications. Part of the exchange occurred while she was being attached to a heart monitor to keep track of her racing heartbeat. Given all of the circumstances, the verbal exchange was occurring in a highly-informal and fluid situation. It was unlikely that the victim would have developed any expectation in this setting that her statements would be available for use at trial, as she was preoccupied

with securing medical care for herself and her unborn child, and she had plainly suffered serious injuries in a substantial attack that warranted that medical care.

It would be mistaken to treat this as only a "private dispute" in which the danger to the victim was concluded. The danger was *not* concluded, as the defendant lived with the victim and therefore knew where she would return and plainly would have had access to that location. The defendant was at large and would be free to renew the attack unless the police could act to arrest him. Knowing the defendant's living arrangements and his identity would help them negate that continuing danger. The victim also knew that he had threatened to shoot and kill her, increasing the nature of the emergency in that way. And the danger was far from "private", as the victim disclosed that the defendant was highly intoxicated and driving, creating the danger that the alcohol-addled defendant would pose a danger to others on the road.

D.

The victim's current location and the past-tense nature of her statements do not alone negate the existence of an emergency in other respects, as shown by *Michigan v. Bryant*, 562 U.S. 344 (2011), which likewise involved a victim describing a past-tense event at a location that was remote from the original scene. In the present case, there still would have been an immediate need to address the victim's medical condition and an immediate need to neutralize potential continuing dangers owing to the fact that the defendant knew where the victim lived and had threatened to shoot and kill her.

In *Michigan v. Bryant*, the Court recognized that past-tense statements by the victim could still qualify as non-testimonial because the primary purpose of the statements was to enable police to meet an ongoing emergency. The victim's statements

in that case had occurred 25 minutes after the incident and at a location that was remote from the original crime scene. As shown by *Bryant*, the "ongoing emergency" concept "extends beyond an initial victim to a potential threat to the responding police and the public at large." *Bryant*, 562 U.S. at 359. The analysis is focused on the perspective of the parties at the time of the interrogation, not hindsight – "[i]f the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause." *Id*. at 361 n. 8. "[W]hether an ongoing emergency exists is simply one factor – albeit an important factor – that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id*. at 366. The analysis "requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers." *Id*. at 367-68. "Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is * * * the approach most consistent with our past holdings." *Id.* at 370.

It would be remarkably short-sighted to focus solely on the current, temporary safety of the pummeled victim who had been threatened with armed death. The test does not focus on the risks to the victim alone, and it must consider the nature of the situation that remained vis-à-vis the defendant's unknown whereabouts. "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." *Bryant*, 562 U.S. at 363.

First responders would have an emergency-based interest in developing basic information about the nature of the attack in order to assess the seriousness of the situation, clarify any need for medical attention, and gauge the scope of any continuing danger. "Domestic violence comes in widely varying degrees of dangerousness." *Thomas v. Dillard*, 818 F.3d 864, 879 (9th Cir. 2016). First responders need to inquire into the nature of the attack, the scope of any injuries, the identity of the attacker and where he might be found, and they of course would need to consider whether the defendant would return to a shared residence. "Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). It is a proper part of an emergency that the police would seek "to identify the abuser in order to protect the victim from future attacks." *Clark*, 576 U.S. at 247.

The "ongoing emergency" concept "extends beyond an initial victim to a potential threat to *the responding police* and the public at large." *Bryant*, 562 U.S. at 359 (emphasis added). There was a need for police assistance here. "A 911 call * * * and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Davis v. Washington*, 547 U.S. 813, 827 (2006).

A reasonable view of the scenario easily yields the expectation that one of the next steps to be taken by police would be to ensure that the violent offender has not returned to the shared residence. The dangers posed to police investigating domestic-

violence situations are fairly well known, and, given the defendant's threats of armed violence, this defendant fit within the category of offenders who pose such dangers. "[M]ore officers are killed or injured on domestic violence calls than on any other type of call." *Thomas*, 818 F.3d at 880 (quoting case law and Senate testimony). "[D]omestic violence calls present a significant risk to police officers' safety * * *." Id. at 880. "[W]e have repeatedly (and correctly) recognized the unique dangers law enforcement officers face when responding to domestic violence calls – including the inherent volatility of a domestic violence scene, the unique dynamics of battered victims seeking to protect the perpetrators of abuse, the high rate of assaults on officers' person, and the likelihood that an abuser may be armed." Id. at 892 (Bea, J., concurring and dissenting in part).

In the Fourth Amendment context, the United States Supreme Court has recognized that "law enforcement officers may enter a home without a warrant to render *emergency assistance* to an injured occupant *or to protect an occupant from imminent injury*." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (emphasis added). It is reasonable to think that the police will be taking steps to "prevent further violence." Id. at 405. "The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties * * *." Id. at 406. Along the same lines here, ensuring that the violent offender has not returned to a shared residence would be an expected part of the police response, which includes the need "to determine whether violence (or threat of violence) has just occurred or *is about to (or soon will) occur* * * *." *Georgia v. Randolph*, 547 U.S. 103, 118 (2006) (emphasis added).

The medical aspects of the situation cannot be overlooked either, since medical issues play a role in the context-dependent inquiry into whether there was an ongoing

emergency. *Bryant*, 562 U.S. at 364-65. The victim here was only in the early stages of receiving medical care, and questions still needed to be asked to help inform what level of medical care could be required.

The immediacy of all of these concerns place this situation in the "emergency" category, and, given the informality of the verbal exchange and other factors, the bottom-line conclusion is that the victim's statements in describing the nature of the attack and identifying the defendant as the attacker were non-testimonial. The defense failed to establish that, in light of all the circumstances, and viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony.

E.

Given this conclusion, the victim's statements were admissible without the live testimony of the victim, notwithstanding the Eighth District's ardor to hold her accountable to appear and to testify. In that regard, the Eighth District's tone-deaf demand for victim accountability fails to recognize the fear that domestic-violence victims often experience and, if followed, would disregard the State's legal ability to prove its case without the victim's testimony and would potentially and needlessly heighten the trauma suffered by some victims.

Through separation of powers and by operation of law, the State (and not the appellate court) has the prerogative to choose to proceed without the victim when it can prove its case through other admissible evidence. "The General Assembly has implemented an adversarial system of criminal justice in which the parties to a case contest the issues before a court of law, and it has vested county prosecuting attorneys with the authority to represent the state in those proceedings." *State v. Heinz*, 146 Ohio

St.3d 374, 2016-Ohio-2814, ¶ 23. "R.C. 309.08(A) expressly grants the county prosecuting attorney the authority to 'prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party.'" Id. at ¶ 16; *State ex rel. McGinn v. Walker*, 151 Ohio St.3d 199, 2017-Ohio-7714, ¶ 18. Being a party includes the right to adduce evidence in support of the prosecution, see *Heinz*, ¶¶ 2, 17, and, likewise, affords the prosecutor the prerogative to choose what admissible evidence the State will seek to introduce, including what witnesses the State will call to support its case. "[T]he familiar, standard rule [is] that the prosecution is entitled to prove its case by evidence of its own choice * * *." *Old Chief*, 519 U.S. at 186. Prosecutors are not required to adopt the Eighth District's tone-deaf, one-size-fits-all approach towards holding the domestic-violence victim "accountable."

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court reverse the Eighth District's judgment as to Common Pleas No. 651674 and thereby reinstate the convictions and sentences in that case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on April 2, 2024, to the following counsel of record: Kristen Hatcher, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, khatcher@prosecutor.cuyahogacounty.us, counsel for State of Ohio; Michael Wilhelm, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113, mwilhelm@cuyahogacounty.us, counsel for defendant-appellee; Jason J. Blake, Calfee, Halter & Griswold LLP, 1200 Huntington Center 41 South High Street, Columbus, OH 43215, jblake@calfee.com, counsel for Amici Curiae Support and Advocacy Groups for Victims of Domestic Violence.

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