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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MARK D. JENSEN,

Defendant-Appellant

On Review of a Decision of the Court of Appeals, District II, Reversing a Judgment of Conviction Entered in the Kenosha County Circuit Court, the Honorable Chad G. Kerkman, Presiding

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RESPONSE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

LAUREN J. BRECKENFELDER
Assistant State Public Defender
State Bar No. 1094543
breckenfelderl@opd.wi.gov

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804
haskelld@opd.wi.gov

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805

Attorneys for Defendant-Appellant

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INTRODUCTION

Mark Jensen's 2008 homicide conviction was vacated after a federal district court and the Seventh Circuit found that his constitutional rights were violated when the circuit court admitted testimonial statements made by his wife, Julie, before her death. After the case was remanded, the Kenosha County Circuit Court re-determined the constitutional issue that the federal courts, and this Court, had decided, and entered a judgment of conviction and life sentence against Jensen. The circuit court did this over Jensen's objection, and without a jury trial or guilty plea.

The court of appeals reversed, holding the circuit court lacked authority to reevaluate whether Julie's statements were testimonial because this Court had already concluded they were testimonial in a prior appeal. The State asks this Court to ignore the rulings of the federal courts and abandon its own 2007 holding that Julie's letter and statements were testimonial. This Court should affirm because this Court, the federal district court, and the Seventh Circuit correctly held that Julie's statements were testimonial, and those decisions established the law of the case on that issue. The State cannot meet its burden to set aside the law of the case because every prior decision relied on the primary-purpose test that is still used to determine whether statements are testimonial.

ISSUES PRESENTED

1. Did the court of appeals err when relying on *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), instead of the law-of-the-case doctrine, when reversing the circuit court, even though both legal doctrines would require reversal?

This Court, the federal district court, and the Seventh Circuit found that admitting Julie's statements violated the Confrontation Clause. Nevertheless, the circuit court concluded that it could effectively overrule those decisions and admit Julie's statements. The court of appeals reversed, holding that the circuit court was bound by this Court's prior decision in this case under *Cook*.

2. Has the United States Supreme Court altered the primary-purpose tested utilized by this Court in *Jensen I* in a way that allows this Court to abandon its earlier decision?

The circuit court did not find that the law had changed, but concluded it was empowered to revisit the constitutional issue that had been resolved by this Court and the federal courts. The court of appeals reversed, finding the circuit court was without authority to disregard the prior binding decision from this Court.

3. If this Court reverses, should it remand to let the court of appeals address the remaining issues?

Neither the circuit court nor the court of appeals reached this issue, but the parties agree that

if this Court reverses, it should remand to the court of appeals to address the remaining issues on appeal.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

In 2008, Mark Jensen went to trial, charged with homicide in the 1999 death of his wife, Julie. The trial, invalidated by Wisconsin's federal Eastern District Court and then the Seventh Circuit Court of Appeals, lasted 49 days.

The State charged Jensen with homicide after its toxicologist, Dr. Long, concluded that Julie's stomach contained a "large concentration of ethylene glycol," demonstrating "an acute ingestion, at or near the time of death," so much that she could not have consumed that large quantity on her own. (1:3).

Critical to the State's case were Julie's oral and written statements to police against her husband in the weeks before her death. In those statements, Julie told police that if anything happened to her, Jensen would be her first suspect. (298; 909:41, 45-46, 127-28). The State insisted before trial that these statements were "an essential component of the State's case" against Jensen. *Jensen v. Clements*, 800 F.3d 892, 894 (7th Cir. 2015); (App. 136).

Support for the State's theory, that Jensen poisoned his wife (as opposed to the defense theory that Julie took her own life and sought to frame Jensen), was far from overwhelming. For instance, Dr. Long had grossly overestimated the amount of ethylene glycol in Julie's stomach (it actually contained a half teaspoon), and in another case, Dr. Long altered evidence. (903:188-95; 910:33-37). The State's case relied on a witness whom the trial judge called "the top liar I've ever had in court." *Clements*, 800 F.3d at 907. And in turn, that "top liar's" testimony was relied on by other State's experts for their conclusions that Julie was suffocated—a theory that arose for the first time at trial. *Id.* at 897-98. Meanwhile, the jury heard evidence that Julie suffered from a major depressive disorder and posed a significant suicide risk. *Id.* at 907. And there was conflicting evidence about who in the Jensen household conducted internet searches for ethylene glycol poisoning. *Id.* at 906; (App. 145).

As the Seventh Circuit aptly stated: "This case was no slam dunk. The evidence was all circumstantial. And there was significant evidence in support of Jensen's theory that Julie had taken her life . . . ." *Id.* Indeed, the jury deliberated for over 30 hours before voting to convict. *Id.* at 898.

Admission of Julie's "letter from the grave," and other statements to police violated Jensen's right to confrontation. The errors were so significant that the federal district court and Seventh Circuit invalidated Jensen's conviction as constitutionally infirm, granted a writ of habeas corpus, and ordered a retrial. *Id.*; *Jensen v. Schwochert*, No. 11-C-803,

2013 WL 6708767 (E.D. Wis. Dec. 18, 2013). In the federal courts, the State conceded that Julie's statements were testimonial. The State did not appeal the Seventh Circuit's order, and the case was returned to the Kenosha County Circuit Court for retrial.

The letter and statements

Two weeks before she died, Julie wrote a letter to police officer Ron Kosman and Detective Paul Ratzenburg, explaining that if anything happened to her, Jensen would be her first suspect. (298). She sealed the letter in an envelope and gave it to her neighbors, telling them that they should give it to police if anything happened to her. (904:195). Days after writing the letter, Julie called Officer Kosman and left a message saying her husband was trying to kill her. (909:41, 127-28). Kosman heard the message after returning from a personal trip, then visited Julie at her home. She told him that if she wound up dead, it was not a suicide, and Jensen would be her first suspect. (909:41, 45-46). Kosman offered to help her leave the house, but she declined, saying she thought everything would be okay, and that "her emotions were just running a little wild." (909:47-48).

State court proceedings

Under the then-governing test of *Ohio v. Roberts*, 448 U.S. 56 (1980), the circuit court admitted Julie's letter and her statements to Kosman. *State v. Jensen*, 2007 WI 26, ¶9, 299 Wis. 2d 267, 727 N.W.2d 518 (*Jensen I*); (App. 102). The State conceded that Julie's voicemails to Kosman were inadmissible hearsay. *Id.*

Before trial, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), and Jensen sought reconsideration. Applying *Crawford*, the circuit court ruled that Julie's letter and voicemails to Kosman were testimonial and therefore inadmissible. *Jensen*, 2007 WI 26, ¶10. The State conceded that Julie's in-person statements to Kosman were testimonial and inadmissible. *Id.*, ¶11 n.4. The court rejected the State's argument that Julie's statements were admissible under the forfeiture by wrongdoing doctrine. *Id.*, ¶11.

The State appealed, and on bypass, this Court held that under the "facts and circumstances of this case," Julie's letter and her statements to police were testimonial. *Id.,* ¶20; (App. 105). The Court noted that the letter was testimonial because it was "purposefully directed towards law enforcement agents," it was "very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death," and it was intended to implicate her husband. *Id.,* ¶27. The court found Julie's oral statements to police to be testimonial on largely the same basis. *Id.,* ¶30. The statements "served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." *Id.* The court further found that the voicemail "was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities." *Id.*

Although the Court agreed that the letter and statements were testimonial, it adopted a "broad forfeiture by wrongdoing doctrine," and remanded the

case to the circuit court, where, if the State proved by a preponderance of the evidence that Jensen caused Julie's absence, his confrontation right would be forfeited. *Id.,* ¶57; (App. 112).

After a ten-day forfeiture by wrongdoing hearing, the circuit court, the Honorable Bruce Schroeder, found the State met its burden "that Jensen had caused Julie's absence from the trial and thus forfeited his right to confront the testimonial statements attributed to Julie." *State v. Jensen*, 2011 WI App 3, ¶14, 331 Wis. 2d 440, 794 N.W.2d 482 (*Jensen II*). After the forfeiture hearing, the case went to trial where Jensen was convicted. (567).

Four months later, the United States Supreme Court decided *Giles v. California*, 554 U.S. 353 (2008), which invalidated the Wisconsin Supreme Court's holding on the forfeiture-by-wrongdoing doctrine.

On appeal, Jensen argued that under *Giles*, "the admission of the testimonial statements [was] reversible error." *Jensen II*, 2011 WI App 3, ¶24. The *Jensen II* court, bound by the Wisconsin Supreme Court's holding that Julie's letter and statements to Kosman were testimonial, nonetheless found the error admitting those statements to be harmless. *Id.,* ¶¶34-35.

Federal habeas proceedings

Jensen filed a habeas petition in federal court. The United States District Court for the Eastern District of Wisconsin granted Jensen's petition on December 18, 2013. The State did not dispute that

the letter and Julie's statements to Kosman were testimonial. *Schwochert*, 2013 WL 6708767, *6; (App. 128). Nevertheless, before finding a constitutional violation meriting habeas relief, the court was obligated to address the merits of the confrontation claim. *Id.*, *7. The court held that "Jensen's rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court admitted Julie Jensen's letter and testimonial statements to police at his trial and that the errors were not harmless." *Id.*, *17. The court ordered Jensen "released from custody unless, within 90 days of this decision, the State initiates proceedings to retry him." *Id.*

The State appealed. The Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015); (App. 146). The court declared "[t]his letter and other accusatory statements [Julie] made to police in the weeks before her death regarding her husband should never have been introduced at trial." *Id.* at 895. The admission of Julie's letter and her statements violated Jensen's confrontation right: "that the jury improperly heard Julie's voice from the grave in the way that it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated." *Id.* at 908. The error was not harmless, evidenced by the extraordinary weight the State placed on the letter at trial, and the "significant evidence in support of Jensen's theory that Julie had taken her life." *Id.* at 905-07.

Remand to state court for retrial

Jensen's conviction was vacated, and on December 29, 2015, the Kenosha County Circuit reopened the case for further proceedings. (791:4; 806:12; 808:3).

As the parties prepared for a new trial—after the prosecutor suggested he might try to re-admit Julie's testimonial statements—Jensen filed a motion to exclude those statements. (938:6-7; 709). Four months later, the State asked the court to revisit the Confrontation Clause question that had been resolved in the federal courts and Wisconsin Supreme Court. (743). It argued that no court since the trial had actually held that Julie's letter and statements were testimonial and that three recent Supreme Court decisions (*Bryant*, *Clark*, and *Williams*) redefined what constituted a testimonial statement, such that Julie's statements no longer qualified.[1] (743). The State argued that the circuit court was not bound by the decisions of the Wisconsin Supreme Court or federal courts, which held that Julie's letter and statements to Kosman were testimonial. (945:35). Jensen responded that the court was bound under the law-of-the-case doctrine to exclude Julie's letter and statements, because they had already been found to be testimonial by the Wisconsin Supreme Court, the federal district court, and the Seventh Circuit. (765).

[1] Notably, all three cases were decided *before* the Seventh Circuit held that Jensen's confrontation rights had been violated. *Michigan v. Bryant*, 562 U.S. 344 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012); *Ohio v. Clark*, 576 U.S. 237 (2015).

After briefing (709; 743; 761; 763; 765; 769; 773; 775), the court, by the Honorable Chad Kerkman, ruled that the letter was not testimonial and thus, could be admitted at trial. (946:73-79). The court acknowledged that the federal district court and the Seventh Circuit both found that admitting the letter violated Jensen's rights under the Confrontation Clause. (946:74-75). But, not seeing any explicit instruction in those cases that the letter had to be excluded, the circuit court decided it was free to revisit whether the letter was testimonial. (946:74). The court then considered factors first articulated by the United States Supreme Court in 2006, and concluded that the letter was not testimonial and could therefore be admitted at a retrial. (946:78-79). The court made no finding that the law had changed in a way that would allow it to disregard the law-of-the-case.

A month later, the State filed a motion to reinstate the verdict without a retrial. (791). It argued that since the court ruled that the letter was not testimonial, there had been no constitutional error at Jensen's original trial, so a new trial was unnecessary. (791). Jensen responded that the writ of habeas corpus required a new trial. (806). The State insisted the habeas writ only required it to "initiate[] proceedings to retry" Jensen, and that it had no obligation to actually retry him, so it had complied with the writ. (791:1).

While that issue was being briefed, the State filed a motion in the federal district court, seeking clarification of the habeas writ. (791:22). It asserted that the district court's judgment could be read in two

ways: first, it merely required the State to recommence its prosecution of Jensen without regard to whether the State actually afforded him a trial. Second, the habeas order could be interpreted as requiring that the proceedings culminate in a jury verdict unless Jensen entered a plea. (791:26). The State recognized that under the second interpretation, reinstating Jensen's conviction might not comply with the conditional writ, and thus wanted clarification to avoid being found in contempt. (791:27).

The district court ruled that at the time, the State was in compliance with the writ since retrial proceedings had been initiated and were moving forward. (804:5-6). The court warned, however, that "[t]his does not mean . . . that Jensen will not be entitled to relief if the previous conviction is reinstated. The court offers no opinion as to whether the circuit court's determination that challenged statements are non-testimonial is proper and whether Jensen's previous conviction can be constitutionally reinstated without a new trial." (804:6).

Back in state court, the circuit court adopted the State's view that holding a bond hearing and revisiting the issue of the letter's admissibility complied with the writ. (949:8-9). It then reinstated the original judgment of conviction and Jensen's life sentence. (949:8-9*)*. The court's view was that a new trial would be pointless as the evidence would be "materially the same as in the first trial," and it questioned why a trial should be held, since it would take a long time, "six, maybe seven weeks." (949:8-9).

Therefore, the court entered a judgment of conviction and life sentence against Jensen, noting that "the Court of Appeals and the Supreme Court can do as they will." *Id.*

Following the circuit court's re-entry of conviction, Jensen filed a brief in the federal district court, arguing that the failure to retry him violated the habeas writ. *Jensen v. Clements*, No. 11-C-803, 2017 WL 5712690 (E.D. Wis. Nov. 27, 2017). Jensen argued that the district court had continuing jurisdiction to enforce compliance with the writ, and that he was entitled to a new trial. *Id.*

The district court found that it no longer had jurisdiction over the original habeas writ because a new judgment of conviction had been entered. *Id.*, *6. That is, while the federal court invalidated Jensen's first conviction as unconstitutional, it found that this was a new judgment that required Jensen to again exhaust potential state remedies. The court observed: "Whether under this unique set of circumstances the state trial court had the authority to revisit the issue of whether the letter and related statements were testimonial, as well as whether the court's determination on the merits that they were not, are matters of state and federal law of which Jensen is free to seek review in the Wisconsin Court of Appeals." *Id.*, 14-15. The Seventh Circuit affirmed. *Jensen v. Pollard*, 924 F.3d 451 (7th Cir. 2019).

Jensen appealed the circuit court order entering a judgment of conviction against him, and the court of appeals reversed, finding the circuit court erred by re-deciding whether Julie's letter and oral

statements were testimonial after this Court had already decided the issue. *State v. Jensen*, No. 2018AP1952-CR, at 12 (WI App Feb. 26, 2020). The court held that "[n]either we nor the circuit court are at liberty to decide that the letter and other statements Julie made to Kosman are nontestimonial," because the Wisconsin Supreme Court already resolved that issue in *Jensen I*. *Id*. at 11. The court of appeals noted that this Court "made its 'firm belief' abundantly clear [that Julie's statements were testimonial], not just in a case with facts very similar to the facts in this case, but in this case itself, with these exact same facts." *Id*. at 12 (brackets omitted). The court found that it was "not at liberty to state otherwise," under *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), holding that "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Id*. at 11. The circuit court reversed and remanded for a new trial at which Julie's letter and statements would not be admitted into evidence. *Id*. at 12.

ARGUMENT

I. The lower courts were bound by the law-of-the-case doctrine and *Cook* to find that Julie's statements were testimonial, as determined by this Court, the federal district court, and the Seventh Circuit.

The State begins by arguing, not that the court of appeals reached the wrong result, but that it relied on the wrong cases in making its decision. (State's Br. 15-19). There are two consistent legal doctrines that

prevent lower courts from overruling a prior decision from this Court: (1) the law-of-the-case doctrine, and (2) this Court's holding in *Cook*. 208 Wis. 2d at 189. The State complains that the court of appeals cited *Cook*, instead of the law-of-the-case doctrine when reversing the circuit court. But under either legal theory, the result is the same: the circuit court was without authority to revisit whether Julie's statements were testimonial after that issue had been decided by this Court, the federal district court and the Seventh Circuit. The court of appeals' reference to *Cook* rather than the law-of-the-case doctrine does not render its decision erroneous.

A. The law-of-the-case doctrine and *Cook* prohibit lower courts from overruling decisions by this Court.

"[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 (internal quotations omitted). "As most commonly defined, the [law-of-the-case] doctrine posits that when a court decides upon a rule of law, that issue should continue to govern the same issue in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983).

The law-of-the-case doctrine "promotes finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Op. Corp.,* 486 U.S. 800, 816 (1988) (internal quotations omitted). It "is rooted in the

concept that the courts should generally follow earlier orders in the same case and should be reluctant to change decisions already made, because encouragement of change would create intolerable instability for the parties." *Stuart*, 2003 WI 73, ¶23 (quoting *Ridgeway v. Montana High School Ass'n*, 858 F.3d 579, 587 (9th Cir. 1988)).

But the law-of-the-case does not permanently bind a lower court to a decision that is made erroneous by subsequent changes in the controlling law. A lower court may revisit the law-of-the-case, but it should be "loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice."*Christianson*, 486 U.S. at 817. The law-of-the-case may be set aside if "controlling authority has since made a contrary decision of the law applicable to such issues." *Stuart*, 2003 WI 73, ¶23.

Cook recognizes a constraint similar to the law-of-the-case doctrine: "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." 208 Wis. 2d at 189. This holding ensures that "one court, not [the several courts of appeal], is the unifying law defining and development court." *Id.* at 190.

However, like the law-of-the-case doctrine, the rule from *Cook* recognizes an exception where there is a change in the controlling authority. In *Jennings*, this Court held that "the court of appeals must not follow a decision of this court on a matter of federal

law if it conflicts with a subsequent controlling decision of the United States Supreme Court." *State v. Jennings*, 2002 WI 44, ¶19, 252 Wis. 2d 228, 647 N.W.2d 142.

B. The result in this case is the same, regardless of whether the Court applies the law-of-the-case doctrine or *Cook*.

Jensen I held that Julie's statements were testimonial; the lower courts were bound to apply that holding under both the law-of-the-case doctrine and *Cook*.[2] In its decision reversing, the court of appeals cited *Cook*, holding that neither it nor the circuit court could deviate from this Court's holding that Julie's letter and statements were testimonial. (Pet.App. 111).

The State argues that the court of appeals erred in its application of *Cook* when it reversed the circuit court's decision, and that the court instead should have applied the law-of-the-case doctrine. (State's Br. 15). More specifically, the State appears to argue that the court of appeals misapplied *Cook* in finding that both it and the circuit court were required to follow this Court's holding in *Jensen I* that Julie's statements were testimonial. *Id.*

But *Cook* and the law-of-the-case doctrine produce the same result. Under either legal theory, a lower court may depart from a prior appellate court's decision if abiding by the prior holding is contrary to

[2] As discussed below, the circuit court was also bound by the federal court holdings that Julie's statements were testimonial.

subsequent decisions from a higher reviewing court. *See Stuart*, 2003 WI 73, ¶24 (holding a court may set aside the law-of-the-case if required by a change in controlling authority); *Jennings*, 2002 WI 44, ¶19 (holding that lower courts may depart from a decision of this Court if it directly conflicts with a subsequent Supreme Court decision on a matter of federal law). Therefore, a lower court could reevaluate whether Julie's statements were testimonial under both *Cook* and the law-of-the-case doctrine if the United States Supreme Court had issued a decision contrary to this Court's holding in *Jensen I*. The fatal flaw in the State's argument, as will be discussed below, is that there has been no contrary decision.

In its decision, the court of appeals did not blindly follow the holding of the *Jensen I* court, but rather engaged in a thoughtful analysis. The court of appeals noted that the State was asking the courts to consider anew whether Julie's letter and statements were testimonial, despite both the *Jensen I* and the federal courts holding that the statements were testimonial. (Pet. App. 110). The court of appeals considered this Court's reasoning in *Jensen I*, and specifically quoted the opinion: "If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe *Crawford* and the Confrontation Clause do not support such a result." (Pet. App. at 106).

The court of appeals further noted that this Court "made its 'firm belief' abundantly clear, not just in a case with facts very similar to the facts in this case, but in this case itself, with these same exact facts." (Pet. App. 110-112). The court of appeals considered that this Court made its decision in *Jensen I* based not only on the *Crawford* decision, but upon the Confrontation Clause itself. (Pet. App. 112). The court of appeals then reversed the decision of the circuit court and remanded for a new trial. (Pet. App. 112).

While indeed finding that neither it nor the circuit court were at liberty to overrule this Court's previous decision, the court of appeals noted the powerful and unequivocal language this Court used in reaching its initial conclusion that the admission of Julie's letter and statements violated not only the *Crawford* decision, but the Confrontation Clause itself. The court of appeals likewise acknowledged that the federal courts had also found that Julie's letter and statements were testimonial. It was only after engaging in a thorough analysis that the court of appeals reversed the decision of the circuit court.

There is no tension between the principles underlying *Cook* and the law-of-the-case doctrine. Lower courts may depart from a decision of this Court if it directly conflicts with a subsequent controlling authority. *Jennings*, 2002 WI 44, ¶19; *Stuart*, 2003 WI 73, ¶23. The principles underlying *Cook* and the law-of-the-case are thus in harmony: courts may deviate from a prior ruling of a higher court *if*, as a threshold issue, a decision of the Supreme Court directly conflicts with the earlier

decision on a matter of federal law. The State cannot meet this initial threshold as none of the cases cited by the State directly conflict with *Jensen I* on the Confrontation question.

II. This Court, the federal district court, and the Seventh Circuit correctly held that Julie's letter and statements to Kosman were testimonial.

The State faces a steep and, in this case, insurmountable burden in arguing that cases decided since *Jensen I* enable this Court to abandon its earlier ruling. This Court and the United States Supreme Court have made clear that an abandonment of the law-of-the-case is highly disfavored and should only be done in those rare circumstances where a subsequent decision on the law fundamentally conflicts with the earlier decision. The Supreme Court has instructed that a lower court may revisit the law-of-the-case, but it should be "loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson*, 486 U.S. at 817. This Court has similarly held that the law-of-the-case may be set aside only if "controlling authority has since made a contrary decision of the law applicable to such issues." *Stuart*, 2003 WI 73, ¶23.

Thus, the State must demonstrate more than a mere change or refinement in the law to justify this Court's abandonment of the decision it rendered in *Jensen I,* as well as the decisions of the federal district court and the Seventh Circuit. The State

must actually identify a change in the controlling authority that is *contrary* to the earlier decision: "Under the law-of-the-case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is *clearly erroneous and work a manifest injustice*." *Arizona*, 460 U.S. at 618 n.9 (emphasis added).

The Supreme Court's confrontation decisions following *Jensen I* have not redefined its approach to issues involving the Confrontation Clause and have not narrowed the definition of "testimonial." Rather, the Court has decided whether different out-of-court statements made in different contexts are testimonial by looking at the "primary purpose" of the statement—the very test applied in *Davis*. *Davis v. Washington*, 547 U.S. 813 (2006) (also deciding *Hammon v. Indiana*), *Ohio v. Clark*, 576 U.S. 237, 243-244 (2015). Moreover, the State cites to *no* Supreme Court cases concerning the Confrontation Clause that were decided after the Seventh Circuit's binding conclusion that Julie's statements were testimonial.

The Supreme Court's subsequent application of the *Davis* test to different Confrontation Clause cases has not worked a change in authority justifying an abandonment of this Court's prior and unequivocal decision that Julie's letter and statements were testimonial.

A. This Court, the federal district court, and the Seventh Circuit held that Julie's statements were testimonial and those decisions are binding.

1. Confrontation Clause law at the time of *Jensen I*.

In 2007, before *Jensen I*, the United States Supreme Court had already decided *Crawford* and *Davis*. *Crawford* held that the Confrontation Clause bars admission of an out-of-court statement from an individual who does not testify if that statement is "testimonial" and the defendant had no prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68. The Court did not specifically define the meaning of "testimonial," but included various formulations to use when determining whether a statement is testimonial, which included: "[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*. at 52. *Jensen I* relied on this formulation to hold Julie's statements to Kosman and her letter were testimonial. *Jensen I*, 2007 WI 26, ¶20; (App. 106).

Jensen I also had the benefit of the Supreme Court's decision in *Davis*. There, the Court considered an oral statement to a 911 operator made during a domestic abuse incident (*Davis*) and a written statement to an officer *following* a domestic abuse incident (*Hammon*). When considering the statements at issue, the Court looked to the "primary purpose" of the statements and held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

The primary-purpose test first applied in *Davis* has been repeatedly reaffirmed as the correct test for determining whether an out-of-court statement is testimonial. See *State v. Mattox*, 2017 WI 9, ¶32, 373 Wis. 2d 122, 890 N.W.2d 256 ("the dispositive question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the out-of-court statement was to create an out-of-court substitute for trial testimony."). The *Jensen I* Court's decision demonstrates its reliance on *Davis* and *Crawford*.

2. *Jensen I* applied the primary-purpose test when concluding Julie's statements were testimonial.

In making its decision in *Jensen I*, this Court utilized not only the Confrontation Clause principles established in *Crawford*, but also the primary-purpose test created in *Davis* which has remained the applicable test to determine whether statements are testimonial. The *Jensen I* Court recognized the primary-purpose test from *Davis* as the binding test,

and properly looked to the primary purpose of Julie's statements. *Jensen I*, 2007 WI 26, ¶¶24-30; (App. 105-106).

Indeed, in *Jensen I*, the Wisconsin Supreme Court accurately observed that "the proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." *Id.*, ¶24 (quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)); (App. 108).

Jensen I considered *Crawford* and *Davis* and held that Julie's statements and letter were not made for the purpose of addressing an ongoing emergency. *Jensen I*, 2007 WI 26, ¶¶27-30; (App. 106). The Court found that the letter was testimonial because it was "purposely directed towards law enforcement agents," it was "very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death," and it was intended to implicate her husband. *Id.*, ¶27. The Court found Julie's statements to Kosman to be testimonial on largely the same basis, noting that the statements "served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." *Id.*, ¶30; (App. 106).

3. The Supreme Court's confrontation decisions following *Jensen I* have not altered the primary-purpose test.

The Supreme Court's confrontation decisions following *Crawford* and *Davis* have not redefined its approach to issues involving the Confrontation Clause and have not narrowed the definition of "testimonial." Rather, the Court has reaffirmed the primary-purpose test as the correct test for determining whether statements are testimonial by applying that test to different out-of-court statements. *Clark*, 576 U.S. at 244-245.

The State claims that two cases—*Bryant* and *Clark*—have so significantly altered the Confrontation Clause analysis that *Jensen I* is no longer good law. But those cases apply the same primary-purpose test that was used in *Jensen I* and *Davis*.[3] *Bryant* and *Clark* are not contrary to *Davis*, but rather constitute applications of the primary-purpose test to new situations that, notably, bear little resemblance to the facts in this case. The State ignores the high burden it bears and does not explain how these decisions constitute an "extraordinary circumstanc[e,] such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson*, 486 U.S. at 817.

[3] Jensen agrees that *Melendez-Diaz*, *Bullcoming*, and *Williams*, which discuss the primary-purpose test in the context of forensic lab reports, do not reasonably relate to this case. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), *Williams v. Illinois*, 567 U.S. 50 (2012).

a. *Michigan v. Bryant.*

In *Bryant*, police responded to a call that a person had been shot and upon arriving at the scene, located a mortally wounded gunshot victim. *Michigan v. Bryant*, 562 U.S. 344, 348 (2011). The police asked him "what had happened, who had shot him, and where the shooting had occurred," and the victim identified who shot him. *Id*. at 349. The victim died of his injuries later that night and his dying statement to police was used at the defendant's trial. *Id*. at 350.

The Supreme Court granted cert to determine whether the admission of the statements violated the Confrontation Clause, which necessitated the application of the "ongoing emergency" circumstance articulated in *Davis* to this new context: "a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim." *Id*. at 359.

The Supreme Court cited *Davis* and *Crawford* in noting that the "existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id*. at 361. The Court noted that "implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Id.*

The Court noted the difference between the domestic violence scenarios discussed in *Davis* and *Hammon* and the situation presented in *Bryant*: "Domestic violence cases . . . often have a narrower zone of potential victims than cases involving threats to public safety. 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." *Id.* at 363.

The Court held that the victim's statement identifying the shooter was not testimonial because the primary purpose of the interaction was to enable police assistance to meet an ongoing emergency; a dangerous person with a gun was at large and could shoot and kill another person. *Id*. at 374-77. The Court further discussed the significance of the formality or informality of an encounter, noting that formality suggests the absence of an emergency. *Id*. at 377. The Court also denied that the intentions of the police in the interaction should receive controlling weight, emphasizing that at trial, it is the declarant's statements, not the interrogator's questions, that will be introduced to establish the truth of the matter asserted; therefore, the declarant's own statements must pass Sixth Amendment muster. *Id*. at 369.

Bryant applied the primary-purpose test; it did not change the law at all, let alone in a way that is "contrary" to *Jensen I*, or renders that decision clearly erroneous. *Arizona*, 460 U.S. at 618 n.9; *Stuart*, 2003 WI 73, ¶23. In *Bryant*, the Supreme Court was simply applying the primary-purpose test to a new

set of facts, one in which an armed individual who had recently shot someone remained at large.

The emergency situation present in *Bryant* is utterly missing in the present case. In fact, this Court *has already held* that Julie's statements were not intended to address an ongoing emergency. *Jensen I*, 2007 WI 26, ¶¶29-30; (App. 106). None of the language in *Bryant* suggests that this Court's determination was erroneous.

Indeed, the circumstances surrounding Julie's statements support the finding that the primary purpose was *not* to obtain police assistance for an ongoing emergency. If Julie's intention had been to seek police intervention for an ongoing emergency, she would have made arrangements for others to read her letter or deliver it to police immediately, rather than leaving instructions for the letter to be delivered upon her death. And as to her oral statements, Julie left a voicemail rather than seeking emergency assistance by calling 911, and when Kosman offered assistance seeking shelter outside of her home, Julie declined. (909:147). The State has failed to explain how the *Bryant* decision renders this Court's decision in *Jensen I* clearly erroneous, or how *Bryant* was decided contrary to *Davis* or *Jensen I*. There is no reason for this Court to abandon its earlier decision.

The State argues that "*Jensen I* implies that an emergency is the only way such a statement can be nontestimonial," and that *Bryant* and *Clark* "recognized that there could be nonemergency situations in which the declarant's primary purpose

in making a statement is not to create a substitute for trial testimony." (State's Br. 23). This argument fails for several reasons. First, this does not represent a change in the law: "As *Davis* made clear, 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*, 562 U.S. at 366. *Jensen I* simply included in its analysis the important factor of whether an emergency existed.

Second, *Jensen I* did not hold that an emergency is the only situation in which a statement can be nontestimonial, regardless of what the State feels was "implied" in the decision. And third, the State's argument is purely hypothetical as the State does not appear to argue that Julie had a non-emergency purpose in making her statements that would render the statements nontestimonial under current law.

The State also ignores this Court's unequivocal finding that Julie's statements were testimonial. As to the primary-purpose test, the Court found that the statements were not made for emergency purposes:

> The circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial.

Jensen I, 2007 WI 26, ¶30; (App. 106).

This Court was similarly unequivocal regarding the letter, noting that it resembled Lord Cobham's notorious letter accusing Sir Walter Raleigh of treason. *Id.*, ¶29. The Court noted that while Julie's letter was not as formal as Lord Cobham's, "it is still testimonial in nature as it clearly implicates Jensen in her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe *Crawford* and the Confrontation Clause does not support such a result." *Id.*

The State does not assert that *Bryant* renders the *Jensen I* decision clearly erroneous and indeed, it would be absurd to do so. The *Bryant* court's application of the primary-purpose test to a new situation does not undermine this Court's thorough application of the primary-purpose test in *Jensen I*.

b. *Ohio v. Clark.*

The Supreme Court's decision in *Clark* similarly does not change the law regarding testimonial statements in a way that warrants abandonment of this Court's holding in *Jensen I*. In *Clark*, the Supreme Court had to decide whether a three-year-old child's statements to his teachers about suspicious marks on his body were testimonial, where the teachers needed to determine whether it was safe to release the child home. 576 U.S. 237, at 246-247. The Court concluded that those

statements—which were not made to law enforcement—were made for the purpose of addressing child abuse and the safety of the child in the home. *Id*. at 246-247. In its decision, the Supreme Court noted that "statements by very young children will rarely, if ever, implicate the Confrontation Clause" because "few preschool students understand the details of our criminal justice system." *Id*. at 248.

The Supreme Court also noted that "the statements in [*Clark*] are nothing like the notorious use of *ex parte* examination in Sir Walter Raleigh's trial for treason." *Id*. at 249. The Supreme Court further noted that "statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id*.

The Supreme Court's decision in *Clark* does not render this Court's holding in *Jensen I* that Julie's statements were testimonial clearly erroneous. Similar to *Bryant*, *Clark* was applying the primary-purpose test to a new situation, not reinventing the rule. Importantly, the reasons why the Court concluded the child's statements were not testimonial do not apply here. The Court emphasized that the declarant in *Clark* was a toddler; Julie was a grown, college-educated woman. The child's statements were made to his preschool teachers; Julie's letter and statements were made to law enforcement. The child made his statements informally in response to questions from his teacher meant to determine whether he was safe at home; Julie independently and deliberately documented her husband's activities

for law enforcement and named him as a suspect in the event of her future demise.

c. *Bryant* and *Clark* did not change the primary-purpose test that this Court relied on in *Jensen I*.

The State does not argue that *Clark* and *Bryant* were decided contrary to *Davis* or *Jensen I*, or that *Clark* and *Bryant* render the *Jensen I* decision clearly erroneous. The State instead focuses on four alleged differences between *Jensen I* and the Supreme Court's definition of testimonial statements in *Bryant* and *Clark*. None of these differences constitute a change in the law that would warrant abandonment of the *Jensen I* holding.

First, the State argues that the *Jensen I* understanding of what made a statement testimonial was broader, and that under that definition "any statement that could potentially later be used in a criminal investigation or prosecution is testimonial" while *Bryant* and *Clark* require that "the statement is meant to be a substitute for trial testimony." (State's Br. 27).

This Court's analysis in *Jensen I* refutes the State's characterization:

- "The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement

being used against the accused in investigating and prosecuting the crime." *Jensen I*, 2007 WI 26, ¶24; (App. 105-106).

- "The circuit court concluded that the letter was testimonial as it had no apparent purpose other than to 'bear testimony' and Julie intended it exclusively for accusatory and prosecutorial purposes." *Id.*, ¶26 (App. 106).

- "The content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death." *Id.*, ¶27; (App. 106).

- Referring to the voicemails, the court wrote "Again, the circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes." *Id.*, ¶30; (App. 106).

The Wisconsin Supreme Court properly applied the primary-purpose test in *Jensen I*: "No other purpose than to bear testimony," "entirely for accusatory and prosecutorial purposes," and "content and circumstances surrounding" the statements. This is nowhere near the State's characterization of broadly including "any statement that could potentially later be used . . ." Nor is it meaningfully

different from the Supreme Court's analyses in *Davis*, *Bryant*, and *Clark*.

Further, the *Jensen I* Court noted that if it allowed Julie's letter to be admitted, it "would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused." *Id.*, ¶30; (App. 106). Or, put another way, it would be allowed to work as a "substitute for trial testimony."

Second, the State asserts that while *Jensen I* only considered "whether a reasonable person in the declarant's position would foresee whether the statement would be used in an investigation," *Bryant* and *Clark* instruct courts to consider all the circumstances in which an encounter occurs, as well as the statements and actions of both the declarant and the interrogators to objectively determine the interrogation's primary purpose. (State's Br. 27-28). Again, the State does not explain how any difference renders the *Jensen I* decision clearly erroneous. But regardless, any distinction is immaterial under these facts. Julie did not write her letter or leave her voicemail at the prompting of an interrogator; she made her statements of her own initiative in order to create a record for Jensen's future prosecution. Thus, *Jensen I* considered Julie's statements in the full context in which they were made.

Third, the State argues that *Jensen I* implies that statements to law enforcement can only be nontestimonial in emergency situations and that this conflicts with *Bryant* and *Clark*, which the State

asserts recognize "nonemergency situations in which a declarant's primary purpose in making a statement is not to create a substitute for trial testimony." (State's Br. 28). As discussed previously, the State's argument is purely hypothetical and fails to explain how this distinction is implicated under the facts of this case.

Finally, the State argues that because this Court has distilled the factors considered in *Bryant* and *Clark* into the four-factor test articulated in *Mattox*, the Court is "no longer applying the law it established in *Jensen I*." (State's Br. 28). But the four non-exclusive factors identified in *Mattox* are simply used to help identify a statement's primary purpose; they do not change the underlying primary-purpose test. And, most of these factors were expressly considered in *Jensen I*: Formality/informality (*Jensen I*, 2007 WI 26, ¶¶29, 33); whether law enforcement was the recipient (*Id.*, ¶27); and context (*Id.*, ¶¶27-31). Julie's age was not expressly considered, but it also was not discussed in *Mattox* ("This factor, though pertinent in *Ohio v. Clark*.. is not applicable here and will not be discussed." *Mattox*, 2017 WI 9, ¶32 n.7). Further, the State regards her age as a "neutral" factor. (State's Br. 29).

4. The federal district court and the Seventh Circuit decided that Julie's letter and statements were testimonial, and those decisions are binding.

Importantly, this Court is not the only one to conclude that Julie's written and oral statements

were testimonial. This Court and the lower court were also bound by the federal district court and the Seventh Circuit determinations that introduction of these statements violated Jensen's confrontation right.

The circuit court was bound by the federal district court and the Seventh Circuit because the law-of-the-case doctrine includes decisions by federal courts reviewing state court proceedings, such as habeas corpus review. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("Of course in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law-of-the-case and its judgment is binding on all other courts, subject only to the appellate process.").

In this case—as in any habeas case—the State of Wisconsin represented the opposing party in the Seventh Circuit, and the decision on the Confrontation Clause was made in this very case. In fact, in *State v. Mechtel*, the State conceded "that had the defendant brought a habeas corpus proceeding in federal court and had a federal court made a determination that the state proceeding was constitutionally infirm, that determination would be binding." 176 Wis. 2d 87, 95, 499 N.W.2d 662 (1993). Therefore, the circuit court was also bound by the federal district court, and then the Seventh Circuit determinations that introduction of these statements violated Jensen's confrontation right.

The State does not dispute that a federal habeas court's decision on matters of federal

constitutional law is binding in subsequent state-court proceedings. Instead, it insists that the federal courts never actually determined that Jensen's confrontation rights had been violated. (State's Br. 14). This completely ignores the federal courts' explicit holdings that admitting Julie's statements violated Jensen's confrontation right.

The federal district court held that "Jensen's rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court admitted Julie Jensen's letter and testimonial statements to police at his trial and that the errors were not harmless." *Schwochert*, 2013 WL 6708767, *17; (App. 135). To grant Jensen habeas relief, the district court was required to—and did—decide his constitutional claim as well as harmless error.

The Seventh Circuit affirmed, holding that admitting the letter and statements "violated the Confrontation Clause and was federal Constitutional error." *Clements*, 800 F.3d at 899 (App. 139). The court declared "[t]his letter and other accusatory statements [Julie] made to police in the weeks before her death regarding her husband should never have been introduced at trial." *Id.* at 895; (App. 136). The admission of Julie's letter and her statements violated Jensen's confrontation right: "That the jury improperly heard Julie's voice from the grave in the way that it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated." *Id.* at 908; (App. 146). The Seventh circuit further found that the error was not harmless, evidenced by the extraordinary weight the State placed on the letter at trial, and the "significant

evidence in support of Jensen's theory that Julie had taken her life." *Id.* at 905-07; (App. 145-147).

The federal courts unequivocally determined that there was a Confrontation Clause violation, and a Confrontation Clause violation only occurs where statements are determined to be testimonial. *See Crawford*, 541 US at 68. But going a step further, the federal courts' issuance of a writ of habeas corpus further establishes that they had found a confrontation clause violation, because there cannot be a writ of habeas corpus without a constitutional violation. 28 U.S.C. § 2254.

Importantly, the law-of-the-case "encompasses a court's explicit decisions, as well as those issues decided by necessary implication." *United States v. Kaufmann*, 985 F.2d 884, 891 (7th Cir. 1993), citing *Williamsburg Wax Museum, Inc. v. Historic Figures*, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987). Further, "once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (emphasis added). The federal courts' issuance of a writ of habeas corpus thus implicitly establishes a Confrontation Clause violation, and thus their rulings because part of the law-of-the-case.

Despite the implicit and explicit findings by the federal courts that Jensen's confrontation clause rights were violated, the State asserts that the district court never "addressed or resolved whether Julie's statements were testimonial because the parties did not dispute that they were." (State's Br.

14). The State further argues that the Seventh Circuit did not address whether the statements were testimonial. *Id.* It is obvious that the State now regrets its repeated concessions that Julie's statements are testimonial, but its argument that those concessions somehow kept the federal courts from deciding the threshold issue in this case is nonsensical.

It is necessary for the State to ask that this Court ignore the federal rulings that were made because otherwise, it has no argument; *Bryant* and *Clark*, the only cases the State cites for bringing about a change in Confrontation law were handed down prior to the Seventh Circuit's ruling.

The State suggests that the federal courts were kept from deciding whether the statements were testimonial by the State's concessions that they were testimonial. (State's Br. 14). However, it is well understood that a court is never bound by the parties' concessions on points of law. *Krieger v. United States*, 842 F.3d 490, 499 (7th Cir. 2016). The federal courts in Jensen's habeas proceedings were not bound to accept the State's concession that the statements were testimonial if it conflicted with the law. *Hernandez v. Holland*, 750 F.3d 843, 856-57 (9th Cir. 2014). In fact, the State was free to argue in the federal courts that there had been no confrontation violation, but the State chose not to pursue that argument. That the State agreed the statements were testimonial did not, could not, and would not have prevented the federal courts from deciding the issue. (State's Br. 7). Indeed, the federal courts unequivocally stated that Jensen's confrontation

rights had been violated, with the Seventh Circuit proclaiming, "that the jury improperly heard Julie's voice from the grave in the way that it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated." *Clements*, 800 F.3d at 908; (App. 146).

The district court and Seventh Circuit decisions barred the circuit court from re-admitting Julie's letter and statements to Kosman. These decisions, handed down in 2013 and 2015, granted Jensen a new trial because the admission of Julie's testimonial statements violated his constitutional rights under the Confrontation Clause and because such violation was not harmless. To reach this conclusion, the federal courts necessarily—and explicitly—decided that the statements were testimonial. Furthermore, at the time the Seventh Circuit affirmed the district court, the most recent United States Supreme Court case on the Confrontation Clause, *Clark*, had been decided. Further litigation of the exact issue decided by the Seventh Circuit is barred by the law-of-the-case.

5. The State waived any argument that Julie's statements were nontestimonial when it failed to raise that argument before the federal courts.

The State acknowledges that it did not dispute that Julie's statements were testimonial before the federal district court or the Seventh Circuit. (State's Br. 7). The State now contends that this Court should not only excuse its earlier concession, but actually

use its failure to raise the issue in the proper forum to support its argument that the law-of-the-case was not established in the federal courts. (State's Br. 15). While both the federal district court and the Seventh Circuit unquestionably found a constitutional violation, this Court should nonetheless decline to decide whether Julie's statements were testimonial due to the State's repeated failure to raise the issue.

The habeas courts were asked to decide whether Jensen's confrontation rights had been violated and whether that violation was harmless: "Under *Giles*, the admission of Julie's letter and statements to the police, none of which were dying declarations, violated the Confrontation Clause and was federal Constitutional error. . . . That the jury improperly heard Julie's voice from the grave in the way that it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated." *Clements* 800 F.3d at 899, 908; (App. 146).

If the State wished to argue the statements were not testimonial in the habeas litigation, there were three venues for that argument: the federal district court, the Seventh Circuit, or by cert petition to the United States Supreme Court. By not raising its argument before any of the federal habeas courts, the State waived it. See *United States v. Miller*, 2013 WL 3353917, *14 (N.D. Ill) citing *United States v. Husband*, 312 F.3d 247 at 250-251 (7th Cir. 2002) ("because the appellate court has already addressed Miller's challenge to the search warrant and found the search valid, any challenge to the validity of the warrant on remand is closed to the defendant under the law-of-the-case doctrine. Additionally, to the

extent Miller seeks to raise new issues regarding the search warrant that he could have raised on appeal—i.e., the timing of the execution of the warrant—those issues are waived."). Otherwise, the result is a piecemeal, endless litigation.

Piecemeal, endless litigation is precisely what the State's failure to contest the issue in the appropriate forum has created. By conceding the confrontation issue in the federal courts, the State has repeatedly extended the appellate proceedings in this case. This Court should find that the State has waived its argument that Julie's letter and statements are testimonial.

B. Even if the circuit court could revisit the confrontation question, Julie's written and oral statements remain testimonial.

Even if the circuit court could re-visit the higher courts' holdings, the letter and statements to Kosman must still be excluded because they are testimonial under the primary-purpose test set forth by the United States Supreme Court. The primary-purpose test asks "whether, in light of all the circumstances, viewed objectively, the primary purpose of the out-of-court statement was to create an out-of-court substitute for trial testimony. *State v. Mattox*, 2017 WI 9, ¶32 (internal quotations and brackets omitted). Relying on *Clark*, *Mattox* identified four considerations that are helpful when determining whether a particular statement under the circumstances is testimonial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is

given to law enforcement or a non-law enforcement individual; (3) the age of the declarant; (4) the context in which the statement was given." *Id.* The court acknowledged that these were only "some" potential factors to consider. *Id.*

Considering all of the circumstances, Julie wrote the letter and made her statements to Kosman with the primary purpose that the statements be used against Jensen in the case of her death; therefore, they are testimonial.

1. Julie's letter.

Julie's letter, while not written in response to police questioning, was formal. Julie, an adult, college-educated woman, took pen to paper to memorialize her suspicions and accusations regarding Jensen for future use by law enforcement. (298; 904:195; 909:41, 45-48, 127-28). She gave the letter to her neighbors, instructing them to give her letter to police only in the event of her death. (298; 904:195). She addressed it to the Pleasant Prairie Police Department and specific officers. Writing a letter and leaving careful instructions for its delivery to law enforcement does not carry the air of informality of a toddler answering his teachers' questions, as in *Clark*. These statements were formal and were intended to be her testimony from the grave.

As to the second factor, Julie's letter was unquestionably addressed to law enforcement. Julie, on her own initiative, addressed the letter to the police and instructed her neighbor to give the letter to police in the event of her demise. (298; 904:195).

The State also asserts that because of the numerous contacts Julie had previously had with Kosman regarding suspicious behavior, their relationship was not "the usual citizen-law enforcement" relationship and that he was "as much an acquaintance or friend as a police officer." (State's Br. 29). The State ignores that this Court has already noted that "rather than being addressed to a casual acquaintance or friend, the letter was purposefully directed toward law enforcement agents." *Jensen I*, 2007 WI 26, ¶27; (App. 108). Moreover, the letter was addressed not only to Kosman, but also to Detective Ratzenburg (298), reflecting Julie's intention to have the letter delivered to law enforcement officers who would investigate her death, not merely to an acquaintance. This factor supports that the letter was testimonial.

As to the third factor, Julie was an adult college-educated woman. The State regards that as a neutral factor, but this is the opposite of the facts in *Clark*, where the Court held "Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system." 576 U.S. at 248. In contrast, as the State points out, Julie frequently contacted law enforcement to report harassing behavior. (State's brief at 29). This factor does not suggest that the statement was nontestimonial.

As to the fourth factor, this Court has already made its assessment of the letter's context:

> The content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid

> in prosecution in the event of her death, Rather than being addressed to a casual acquaintance or friend, the letter was purposefully directed toward law enforcement agents. The letter also describes alleged activities and conduct in a way that clearly implicates Jensen if "anything happens" to her.

Id. This factor supports that the letter was testimonial.

2. Julie's voicemail and statements.

For similar reasons, Julie's remaining statements to Kosman—the voicemails and the later in-person statements—were also testimonial.

As to the first factor, Julie's voicemail to Kosman was formal. She did not call 911 in a panic seeking emergency assistance; she contacted a member of law enforcement directly and left a voicemail when she failed to reach him, stating that if she died, her husband would be her suspect. (R. 909:41, 127-128). Similarly, her in-person conversation with Kosman was formal; she memorialized her suspicions about her husband with a law enforcement officer, mentioned the letter she had written, and, importantly, declined law enforcement assistance. This factor supports that Julie's voicemail and statements were testimonial.

As to the second factor, for the same reasons discussed in greater detail above, the voicemail and statements were unquestionably made to law enforcement. The State argues that her statements "were not a deliberate or calculated attempt to accuse Jensen of anything, let alone build a criminal case

against him. (State's Br. 32). This Court has already found that Julie's voicemails "were not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities." *Jensen I*, 2007 WI 26, ¶30; (App. 109). The Court noted the circuit court's determination that "these statements served no other purpose than to bear testimony and were entirely for accusatory purposes." *Id.* The facts of this case remain unchanged since *Jensen I*; the earlier determinations made by this Court remain applicable and appropriate.

As to the third factor, again, Julie's age and frequent contact with law enforcement do not suggest that the statements are nontestimonial.

As to the fourth factor, the context within which the statements were made, this Court's earlier finding that the voicemail was not made for emergency purposes but rather to rely information for investigation demonstrates that the statements were made in a testimonial context. *Id.*

As a final argument, the State argues that this Court's decision in *State v. Reinwand*, 2019 WI 25, 385 Wis. 2d 700, 924 N.W.2d 184 shows that these statements were nontestimonial, arguing in part that "Julie spoke to a trusted friend and expressed her fears that a family member might harm her." (State's Br. 32). Jensen would again point to this Court's own finding that Julie's statements "were not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in

order to further the investigation of Jensen's activities." *Jensen I*, 2007 WI 26, ¶30; (App. 109).

The only reasonable interpretation of Julie's written and oral accusations is that they were intended to ensure that her husband would be prosecuted and convicted after her death. This was not merely the primary purpose of Julie's statements, it was the only purpose. These were the very essence of testimonial statements. Considering all of the circumstances, Julie wrote the letter and made her statements to Kosman with the primary purpose that the statements be used against Jensen in the case of her death; therefore, they are testimonial.

These circumstances are the opposite of the nontestimonial statements discussed in *Davis*, *Bryant*, and *Clark*. In *Davis*, the declarant called 911 to report a physical attack on her; thus, its purpose was to respond to an ongoing emergency aimed to halt the attack. 547 U.S. at 828. In *Bryant*, a mortally wounded victim's statement identifying the shooter was not testimonial because there was an ongoing emergency; a dangerous person with a gun was at large and could shoot and kill another person. 562 U.S. at 374-77. And there is nothing from *Clark*—a case involving statements a child made to a teacher in order to ensure his physical safety when teachers saw marks on his body—that suggests Julie's statements were nontestimonial. Julie's statements bear no resemblance to any of these cases involving on-going emergencies.

The Wisconsin Supreme Court previously explained that Julie's letter most closely resembles the quintessential confrontation violation:

> Perhaps most tellingly, Julie's letter also resembles Lord Cobham's letter implicating Sir Walter Raleigh of treason as discussed in *Crawford*. At Raleigh's trial, a prior examination and letter of Cobham implicating Raleigh in treason were read to the jury. Raleigh demanded that Cobham be called to appear, but he was refused. The jury ultimately convicted Raleigh and sentenced him to death. In the Supreme Court's view, it was these types of practices that the Confrontation Clause sought to eliminate. While Julie's letter is not of a formal nature as Cobham's letter was, it still is testimonial in nature as it clearly implicates *Jensen I*n her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused.

Jensen I, 2007 WI 26, ¶29 (internal citations omitted); (App. 109). This Court's unequivocal findings regarding the letter and statements are as true today as they were in 2007. In light of this holding, and the absence of evidence of an on-going emergency, Julie's statements were testimonial.

III. If this Court reverses, it should remand to let the court of appeals address the remaining issues.

If this Court reverses the court of appeals' decision, Jensen joins the State in asking this Court

to remand the case to the court of appeals to address all arguments presented to that court that are not resolved by this Court. Each provide separate reasons why a new trial must be held, including: (1) whether the circuit court illegally directed the entry of a guilty verdict without a trial, (2) whether the circuit court illegally reinstated the conviction that had been found constitutionally infirm by the federal courts on habeas review, (3) whether the circuit court failed to comply with the habeas writ that Jensen get a new trial, (4) whether Jensen's 2008 trial was infected by judicial bias, and (5) any issues concerning the admissibility of Julie's statements under the Confrontation Clause that this Court does not address.

CONCLUSION

For the reasons stated above, Jensen respectfully requests that this Court affirm the decision of the court of appeals and remand for a new trial. If the court reverses, he asks that the Court remand to the court of appeals to address the remaining issues that were presented to that court.

Dated this 15th day of September, 2020.

Respectfully submitted,

LAUREN J. BRECKENFELDER
Assistant State Public Defender
State Bar No. 1094543
breckenfelderl@opd.wi.gov

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804
haskelld@opd.wi.gov

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805

Attorneys for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,993 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 15th day of September, 2020.

Signed:

Lauren J. Breckenfelder
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby 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 instead of full names of persons, 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 15th day of September, 2020.

Signed:

Lauren J. Breckenfelder
Assistant State Public Defender

APPENDIX

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