

No. 14-1380

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

MARK D. JENSEN,

Plaintiff-Appellee,

v.

MARC CLEMENTS,

Respondent-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN, CASE NO. 11-CV-803, THE
HONORABLE WILLIAM C. GRIESBACH, PRESIDING

APPELLANT'S PETITION FOR PANEL REHEARING

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APPELLANT'S PETITION FOR PANEL REHEARING

The respondent-appellant, Marc Clements, hereby petitions this court pursuant to Fed. R. App. P. 40 and 7th Cir. R. 40 for a panel rehearing on the ground the court has overlooked a point of law critical to the determination whether Jensen is entitled to relief on his Confrontation Clause claim. Specifically, both the court and the parties have overlooked the threshold question whether there is any clearly established Federal law, as determined by the Supreme Court of the United States, that establishes that an unsolicited letter addressed to the police, lacking any indicia of formality, constitutes a testimonial statement under *Crawford v. Washington*, 541 U.S. 36 (2004), or post-*Crawford* cases decided before the state appellate court rendered its decision in Jensen's direct appeal.

The parties, the district court and this court focused on whether the Wisconsin Court of Appeals reasonably applied *Chapman v. California*, 386 U.S. 15 (1967), in determining that admission of a letter written by Julie Jensen was harmless error. But the threshold question should have been whether there exists clearly established Federal law holding that the letter is testimonial under *Crawford*, so that its admission violated Jensen’s Sixth Amendment right to confrontation. Absent a confrontation violation, it would be unnecessary to decide whether the state court reasonably applied the Supreme Court’s harmless-error jurisprudence.

Because, as Clements discusses below, no clearly established Supreme Court case existing at the time of the last state-court decision on the merits held that an unsolicited letter addressed to police, lacking any earmarks of formality, qualifies as testimonial, Jensen is not entitled to issuance of the writ.

ARGUMENT

- I. **Clearly Established Federal Law As Determined By The Supreme Court Is A Necessary Prerequisite To Obtaining Relief Under 28 U.S.C. § 2254(d)(1), And This Requirement Cannot Be Waived.**
 - A. **General principles for determining whether there is “clearly established Federal law” under 28 U.S.C. § 2254(d)(1).**

Title 28 U.S.C. § 2254(d)(1) provides that where the state courts decide a federal constitutional claim on the merits, a federal court may not grant habeas corpus relief unless the decision was “contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Bailey v. Lemke*, 735 F.3d 945, 949 (7th Cir. 2013). The initial inquiry, therefore, is whether any clearly established federal law as determined by Supreme Court precedent exists. See *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004) (“We begin by determining the relevant clearly established law.”); *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) (“Whether the law is clearly established is *the* threshold question under § 2254(d)(1).”).

Clearly established federal law “refers to the holdings, as opposed to the dicta” of the Supreme Court. *Alvarado*, 541 U.S. at 660 (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Habeas relief under § 2254(d)(1) is appropriate only if “the Supreme Court has ‘clearly established’ the propositions essential to [the petitioner’s] arguments.” *Henry v. Page*, 223 F.3d 477, 480 (7th Cir. 2000) (quoting *Mueller v. Sullivan*, 141 F.3d 1232, 1234 (7th Cir. 1998)). A rule is “clearly established” only if compelled by existing Supreme Court precedent. *Hubanks v. Frank*, 392 F.3d 926, 932 (7th Cir. 2004).

Beginning with *Carey v. Musladin*, 549 U.S. 70 (2006), the Supreme Court has taken a narrow view of what constitutes “clearly established Federal law” within the meaning of § 2254(d)(1).

There, members of the victim’s family sat in the front row of the spectators’ gallery during a portion of Musladin’s murder trial, wearing

buttons bearing the victim's photo. *Musladin*, 549 U.S. at 72. The California appellate court rejected the claim that the family's action denied Musladin a fair trial.

In Musladin's federal habeas appeal, the Ninth Circuit held that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court, i.e., *Estelle v. Williams*, 425 U.S. 501 (1976), combined with *Holbrook v. Flynn*, 475 U.S. 560 (1986). *Musladin v. Lamarque*, 427 F.3d 653, 656-58 (9th Cir. 2005).

The Supreme Court disagreed, pointing out that both *Williams* and *Flynn* dealt with State practices. *Musladin*, 549 U.S. at 75. The Court then observed:

In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. And although the Court articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, we have never applied that test to spectators' conduct.

....

Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of Williams and Flynn to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

Id. at 76-77 (emphasis added and footnote omitted).

Musladin therefore instructs that “Supreme Court holdings—the exclusive touchstone for clearly established federal law—*must be construed narrowly and consist only of something akin to on-point holdings.*” *House*, 527 F.3d at 1015 (emphasis added).

Post-*Musladin*, the Court continued to take a narrow view of “clearly established Federal law” in *Wright v. Van Patten*, 552 U.S. 120, 123-26 (2008) (per curiam), and *Thaler v. Haynes*, 559 U.S. 43, 46-49 (2010) (per curiam). Following the example the High Court had set in *Musladin*, *Van Patten*, and *Haynes*, this court in *Bland v. Hardy*, 672 F.3d 445 (7th Cir. 2012), concluded that no clearly established Federal law supported Bland’s contention that the prosecution had violated Bland’s right to due process by taking advantage of an error in Bland’s testimony that the prosecutor knew was false. *Bland*, 672 F.3d at 447. Whereas Bland testified that police had confiscated his .38 caliber handgun in January 2000, eight months before he stole guns from his father’s house and ended up shooting his stepmother, police had actually confiscated Bland’s .38 in January 2001, months *after* the shooting. *Id.* at 446-47. Knowing that Bland’s testimony about the timing of the confiscation was wrong, the prosecutor nevertheless argued that it gave Bland a motive to steal his father’s guns because he could not legally purchase a replacement for the confiscated weapon. *Id.*

This court rejected Bland’s argument that the prosecutor’s conduct violated *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*,

405 U.S. 150 (1972): “*Napue* and *Giglio* hold that a prosecutor may not offer testimony that the prosecutor knows to be false. They do not hold that a prosecutor is forbidden to exploit errors in testimony adduced by the defense.” *Bland*, 672 F.3d at 447. “Until the Supreme Court has made a right *concrete*, it has not been ‘clearly established.’” *Id.* at 448 (citation omitted).

The foregoing cases establish how restrictively the Supreme Court and this court have defined “clearly established Federal law” under § 2254(d)(1). Using that narrow definition, Clements will show in section II. why there is no clearly established Federal law supporting the proposition that an unsolicited letter to police bearing no trappings of formality qualifies as a testimonial statement under the Confrontation Clause. But first, Clements will explain why his failure to argue this point in the district court or this court should not prevent this court from addressing it now.

B. The existence of clearly established Federal law is an integral part of the standard of review Congress mandated in enacting AEDPA, and the government cannot waive the standard of review.

A leading scholar on federal habeas practice has observed that “[i]t is generally understood that the deferential review standards under § 2254(d) and (e)(1) may not be waived by the government.” Brian R. Means, *Federal Habeas Manual*, § 3:97 at 441 (2015). To support this statement, Means cites cases from five federal appellate courts, pronouncing that AEDPA’s standard of review is non-waivable. *Id.* at 441-42. The cited cases include *Eze v.*

Senkowski, 321 F.3d 110, 121 (2d Cir. 2003); *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015); *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008), *overruled on other grounds by Cullen v. Pinholster*, 563 U.S. 170 (2011); *Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014); and *Gardner v. Galetka*, 568 F.3d 862, 877-79 (10th Cir. 2009). Means at 441-42.

Clements recognizes that the foregoing cases involved the issue whether the proper standard of review was deferential or de novo, rather than the issue whether clearly established Federal law supported the claim of a constitutional violation. Despite this difference, those cases are equally applicable where the threshold inquiry is whether clearly established Supreme Court jurisprudence supports the petitioner's claim that a constitutional violation caused his conviction, for that threshold inquiry is an integral part of AEDPA's standard of review. Support for this proposition comes from *William v. Taylor*, 529 U.S. 362, 380 (2000): "It is perfectly clear that AEDPA codifies *Teague* [*v. Lane*, 489 U.S. 288 (1989)] to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final" (footnote omitted).

In a case more similar to ours because it involved the question whether California had waived or forfeited the argument that *Oregon v. Elstad*, 470 U.S. 298 (1985), rather than *Missouri v. Seibert*, 542 U.S. 600 (2004), was the clearly established Federal law against which the reasonableness of the state

court's decision should be measured, the court in *Thompson v. Runnels*, 705 F.3d 1089, 1098-99 (9th Cir.), *cert. denied*, 134 S. Ct. 234 (2013), rejected Thompson's assertion that the State had waived the argument that only *Elstad* qualified.

California had not argued in its district-court briefs or its original brief in the Ninth Circuit that only *Elstad* was "clearly established Federal law" under § 2254(d)(1). *Thompson*, 705 F.3d at 1098. Rather, California first advanced this argument in a petition for rehearing and rehearing en banc, following the appellate court's determination that the state appellate court's decision was contrary to *Seibert*. *Id.* at 1095. After the Ninth Circuit denied its petition, California sought a writ of certiorari, arguing that only *Elstad* qualified as clearly established precedent. The Supreme Court granted the petition, vacated the judgment, and remanded to the Ninth Circuit for further consideration in light of *Greene v. Fisher*, 132 S. Ct. 38 (2011), which had been decided while California's certiorari petition was pending. *Thompson*, 705 F.3d at 1095-96.

In rejecting Thompson's waiver claim on remand, the court acknowledged AEDPA's standard for granting review under § 2254(d)(1), remarking that "to resolve the question whether the state court's decision met this standard, we must first address the antecedent question whether *Elstad* or *Seibert* is the relevant 'clearly established Federal law.'" *Thompson*, 705 F.3d at 1098.

Similarly, in determining whether Jensen is entitled to relief, this court must address the antecedent question whether *any* clearly established Federal law supports the proposition that Julie’s letter is testimonial so that its admission violated the Sixth Amendment. As demonstrated below, the answer is no.

II. *Crawford v. Washington* And Every Subsequent Confrontation Case The Supreme Court Had Decided When The Wisconsin Court Of Appeals Issued Its Decision In Jensen’s Appeal Involved Statements That Were Generated By The State And Possessed Some Indicia Of Formality.

In *Greene*, 132 S. Ct. at 44, the Supreme Court held that “clearly established Federal law” under 28 U.S.C. § 2254(d)(1) includes only Supreme Court decisions existing at the time of the last adjudication of the merits in state court. Under *Greene*, therefore, only Supreme Court cases decided before December 29, 2010 – the date the Wisconsin Court of Appeals decided Jensen’s appeal¹ – qualify as clearly established Federal law for present purposes. Those cases are *Crawford*; *Hammon v. Indiana*, decided with *Davis v. Washington*, 547 U.S. 813 (2006); *Giles v. California*, 554 U.S. 353 (2008); and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

Without exception, all of the above cases involved statements that were generated by agents of the government, either through police questioning or through scientific testing conducted by state employees.

¹ See *State v. Jensen*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482.

In *Crawford*, 541 U.S. 36, the Court held that statements the defendant's wife made during a police interrogation were testimonial under the Sixth Amendment. Two years later, the Court in *Davis* decided that a victim's statements in response to a 911 operator's interrogation were not testimonial under *Crawford*, and in *Hammon* held that a domestic-battery victim's written statements to an officer in an affidavit were testimonial.

Although *Giles* involved the contours of the doctrine of forfeiture by wrongdoing, the underlying statements there were made in response to questioning by police investigating a report of domestic violence. *Giles*, 554 U.S. at 377-78 (Thomas, J., concurring).

In the last confrontation case decided before the decision in Jensen's appeal, the Court in *Melendez-Diaz*, 557 U.S. at 308-310, held that certificates of analysis sworn to by analysts at a state lab were affidavits falling within the core class of testimonial statements described in *Crawford*.²

None of the holdings in the above cases compels the conclusion that an

² Although none of them constitute "clearly established Federal law" for purposes of Jensen's case, the Court's Confrontation Clause decisions after 2010 also do not hold that statements made without any government involvement are testimonial. See *Michigan v. Bryant*, 562 U.S. 344 (2011) (statements made by shooting victim during police questioning nontestimonial); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (forensic lab report certified by analyst employed by state lab required to assist in police investigations testimonial); *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (finding no confrontation violation where the evidence at issue was a DNA profile generated at request of a state crime lab following a rape); and *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (young child's statements made in response to teacher's questions not testimonial).

unsolicited letter to police created without any government involvement qualifies as testimonial under the Confrontation Clause. Rather, in all of the above cases, the government was involved in the creation of the statement. Additionally, in every case where the Court determined a statement to be testimonial, some formality surrounded its making. In *Crawford*, formality was imparted by the circumstances of the police interrogation of Crawford's wife, which "followed a *Miranda* warning, was tape-recorded, and took place at the station house." *Hammon*, 547 U.S. 813, 830 (2006) (describing formality of the interrogation in *Crawford*). In *Hammon*, defendant's wife first answered questions, then executed an affidavit. *Id.* at 831-32. Finally, in *Melendez-Diaz*, the certificate of analysis was the equivalent of an affidavit.

That some state courts believe that police involvement in a statement is a prerequisite to finding it testimonial further illustrates that the Supreme Court has not resolved this issue.

For example, in *State v. Barnes*, 854 A.2d 208 (Me. 2004), the court held that the statements the defendant's mother had made to police when she fled Barnes's prior assault and drove to the police station were not testimonial. Among the circumstances the court cited to support this determination were the fact the mother went to the station on her own without police seeking her out, and that she was not responding to tactically structured police questioning as in *Crawford*. *Id.* at 211.

Likewise, in *Wilson v. State*, 151 S.W.3d 694 (Tex. App. 2004), the

court, in concluding that statements the defendant's girlfriend made to police were not testimonial, stressed that she initiated the interaction with police and was not responding to tactically structured police interrogation as in *Crawford*. *Id.* at 698.

Just three years ago, the court in *People v. Arauz*, 210 Cal. App. 4th 1394, 1401 (Cal. Ct. App. 2012), said that “[p]ursuant to *Crawford*, out-of-court statements can be divided into police interrogations (‘testimonial’ hearsay) and statements in which no interrogation takes place (‘non-testimonial’ hearsay).” Although overly simplistic, this statement further illustrates that even eight years post-*Crawford* the lower courts do not believe that, outside the forensic context, the Supreme Court has resolved whether a statement made without any police questioning or involvement is testimonial under the Confrontation Clause.

III. The Wisconsin Supreme Court’s 2007 Determination That Julie Jensen’s Letter Is Testimonial Was Based On The Third Proposed Formulation From *Crawford*; But Because The Court Has Never Adopted That Formulation, It Is Not Clearly Established.

In *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 26, the Wisconsin Supreme Court held that Julie Jensen’s letter was testimonial under the third formulation of *Crawford*, 541 U.S. at 52, i.e., “statements 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” (citation omitted). *Jensen*, 727 N.W.2d 26, ¶ 20 (“only the third formulation . . . is applicable to the statements at issue in this case”). In so holding, the court rejected the State’s argument that the government needs to be involved in the creation of a statement to render it testimonial. *Id.* ¶ 24. Even so, the state supreme court admitted that “there is support for the proposition that the hallmark of testimonial statements is whether they are made at the request or suggestion of the police.” *Id.*

The state court’s use of the third formulation of testimonial suggested in *Crawford* followed the court’s decision in *State v. Manuel*, 2005 WI 75, ¶ 39, 281 Wis. 2d 554, 697 N.W.2d 811, to “adopt all three of *Crawford*’s formulations” out of an abundance of caution, and to “save for another day whether any of these formulations . . . surpass all others in defending the right to confrontation.” Given the scant guidance *Crawford* provided, that position was sensible.

But as the Ninth Circuit later explained in *Meras v. Sisto*, 676 F.3d 1184, 1188 (9th Cir. 2012), the Supreme Court has never adopted this third formulation of testimonial:

[T]he Court did not adopt this formulation, or any other. It left “for another day any effort to spell out a comprehensive definition of ‘testimonial,’ ” and held only that, “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” [citing *Crawford*] This left the term susceptible to a broad range of reasonable applications. See *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

The Wisconsin Supreme Court's determination that Julie Jensen's letter is testimonial obviously does not bind a federal court in a 28 U.S.C. § 2254 proceeding tasked with determining whether "clearly established Federal law" supports Jensen's claim that his right to confrontation has been violated. Regrettably, the undersigned did not advance in the district court or in this court the argument that neither *Crawford* nor any other clearly established Supreme Court case supports Jensen's claim of a confrontation violation stemming from the admission of his wife's letter. Instead, after the state supreme court had determined the letter to be testimonial, the State in the Wisconsin Court of Appeals focused its energy on convincing the court that admission of the letter was harmless error. After the state court of appeals agreed, the undersigned proceeded along the same path in Jensen's habeas proceeding without considering that she could challenge the state court's determination in federal court.³

Despite the tardiness of this argument, for which the undersigned accepts full blame, this court should consider it because it goes directly to the standard of review mandated by AEDPA. As the authorities cited in argument I. establish, the parties cannot waive the standard of review, either by design or, as here, unintentionally.

³ See *Daniels v. Lafler*, 501 F.3d 735, 740 (6th Cir. 2007) (federal court should not apply AEDPA deference to a state court's pro-petitioner resolution of Sixth Amendment issue).

CONCLUSION

While Clements is painfully aware of the effort this court and opposing counsel have already expended during this appeal, he asks this court to grant this petition and order the parties to brief the threshold question whether any clearly established Supreme Court case supports Jensen's claim of a confrontation violation in the admission of his wife's letter.

Dated this 29th day of September, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2015, I electronically filed the foregoing **Appellant's Petition for Panel Rehearing** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Marguerite M. Moeller
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