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COURT OF APPEALS

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MARK D. JENSEN,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONOROABLE CHAD G. KERKMAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

This case is about whether a circuit court must always follow a prior ruling of this Court even if the controlling law has changed since the earlier decision.

Mark Jensen killed his wife, Julie, in 1999. Before she died, she made statements saying that if anything happened to her, police should suspect Jensen. In 2007, this Court decided that Julie's statements were testimonial hearsay for purposes of the Sixth Amendment's Confrontation Clause. But it acknowledged that they could still be admitted against Jensen if the circuit court determined that he had forfeited his right to confront her. The court so determined, and the State presented Julie's statements at Jensen's trial. A jury convicted Jensen, and the court of appeals affirmed Jensen's conviction.

Federal courts determined that Jensen should get habeas corpus relief. The case returned to state court, and a new trial was scheduled. During the pretrial proceedings, Jensen sought to exclude Julie's statements. The circuit court determined that the statements were no longer testimonial based on United States Supreme Court confrontation decisions issued since 2007. Then, reasoning that the evidence at a new trial would be the same as at the first one, the court reinstated Jensen's conviction.

The court of appeals reversed. It concluded that this Court's decision in *Cook* required both it and the circuit court to follow this Court's 2007 ruling.

This Court should reverse that decision. An established exception to the law-of-the-case doctrine allows a circuit court to revisit an appellate court's prior ruling in a case when there has been an intervening change in the law. In addition, the circuit court was required to apply this current confrontation law when assessing the admissibility of Julie's statements

because it conflicts with this Court's 2007 decision. And, under current law, Julie's statement are no longer testimonial. The circuit court thus correctly determined that Julie's statements were admissible.

This case presents other issues that the court of appeals did not reach—whether the circuit court had the authority to reinstate Jensen's conviction without holding a trial and whether doing so violated the federal court's order granting habeas relief. This Court should remand to let the court of appeals consider these claims in the first instance.

ISSUES PRESENTED

1. Did the court of appeals err when it concluded that *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), required both it and the circuit court to follow this Court's 2007 holding that Julie Jensen's statements were testimonial?

The circuit court held that decisions of the United States Supreme Court narrowing the definition of testimonial since 2007 allowed it to revisit this Court's prior decision.

The court of appeals held that *Cook* required both it and the circuit court to follow this Court's earlier decision.

This Court should hold that the court of appeals misapplied *Cook*. It should also conclude that an exception to the law-of-the-case doctrine allowed the circuit court to revisit this Court's prior decision based on a change in the controlling law. The Court should also determine that the circuit court was required to apply current law when assessing whether Julie's statements were testimonial.

2. Are Julie's statements nontestimonial under the narrower definition of testimonial adopted by the United States Supreme Court since 2007?

The circuit court concluded that Julie's statements were not testimonial under current law.

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

This Court should conclude that under current law, Julie's statement are not testimonial.

3. Should this Court remand to the court of appeals to let it address the remaining issues that it did not decide because of its holding that it and the circuit court were bound by this Court's prior decision?

The State and Jensen briefed three other issues in the court of appeals. They are (1) whether the circuit court erred by reentering Jensen's judgment of conviction without a new trial, (2) whether the circuit court violated a federal court decision granting Jensen habeas corpus relief by reinstating the judgment, and (3) whether the judge at Jensen's trial was biased against Jensen.

The circuit court concluded that it had the authority to reinstate Jensen's conviction and that its decision did not violate the federal court's decision. It did not address Jensen's judicial bias claim.

The court of appeals reaffirmed its prior decision rejecting Jensen's judicial-bias claim. It also concluded that it did not need to address the other two issues in light of its decision to grant Jensen a new trial on his other claim.

This Court should remand to the court of appeals to address whether the circuit court could reinstate the judgment and do so without violating the federal court's order. Remand on the judicial-bias claim is unnecessary.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case that this Court has accepted for review, both oral argument and publication are appropriate.

STATEMENT OF THE CASE

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

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

Julie Jensen died in 1998. The medical evidence showed that her death was the result of ethylene glycol poisoning and asphyxia by smothering. (R. 628:18.) In 2002, the State charged Jensen with first-degree intentional homicide for killing Julie. (R. 1:1.)

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

Kosman further testified that Julie had contacted him 40 to 50 times since 1992 or 1993. (R. 834:42, 51–52.) These contacts involved her reporting harassing telephone calls and pornographic photos left at Jensen and Julie's residence that Julie thought were threatening to their relationship. (R. 834:52; 909:51–57.) Kosman said that he responded to the residence for these calls about 30 times. (R. 909:53.)

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

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

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

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

rejected the State's argument that Julie's statements were admissible under the forfeiture-by-wrongdoing doctrine. (R. 628:5.)

The State appealed. (R. 152:6.) Jensen cross-appealed an order from the circuit court that had determined that other statements Julie had made to Wojt and her child's teacher, Theresa DeFazio, were nontestimonial. (R. 152:6–7.)

On bypass, this Court held that Julie's letter and voicemail were testimonial. (R. 152:17–19.) It also adopted a "broad" forfeiture-by-wrongdoing doctrine under which a defendant forfeits his right to confront a witness if he is the cause of the witness's unavailability for cross-examination. (R. 152:32–33, 35.) The Court remanded for a hearing to allow the circuit court to apply this forfeiture standard. (R. 152:35–36.) The court also determined that the circuit court had correctly concluded that Julie's statements to Wojt and DeFazio were nontestimonial. (R. 152:19–21.)

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

Jensen's direct appeal

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

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

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

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

Jensen's federal habeas corpus petition

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

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

The court granted Jensen's petition. *Id.* at *7. The court first rejected the State's arguments that *Giles* did not apply and that Jensen intended to keep Julie from testifying in family court. *Id.* at *7–9. It next concluded that the admission of Julie's statements under the circuit court's pretrial

forfeiture-by-wrongdoing decision violated Jensen's confrontation rights under *Giles*. *Id*. at *9. Finally, the court held that the statements' admission was not harmless error. *Id*. at *9–16.

The court ordered that Jensen be "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id*. at *17.

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

Post-habeas proceedings in the circuit court and federal court

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

Jensen moved to exclude Julie's testimonial statements. (R. 659.)[1] The parties extensively briefed whether the statements would be admissible. (R. 659; 709; 743; 761; 763; 765; 769; 773; 775.)

Jensen argued that this Court and the federal courts had determined that Julie's statements were testimonial, and this established the law of the case that the court needed to

[1] Jensen also sought to exclude other evidence that had been admitted at his trial, including statements Julie had made to police when reporting the harassing phone calls and pornographic photos. (R. 709; 761.) Jensen claimed that these statements were testimonial hearsay based on confrontation law decided since *Jensen I*. (R. 709; 761:2–5; 945:11–20.) He additionally moved to exclude the statements Julie had made to DeFazio and Wojt that this Court had concluded were nontestimonial. (R. 711.) The court denied both motions. (R. 943:163–64; 945:145–46.)

follow. (R. 659:6; 761:2–3; 945:62–63.) In response, the State argued that the court was not bound to follow the federal decisions because they did not hold that Julie's statements were testimonial. (R. 743:2–3; 945:34–35, 63.) It also argued that, under changes in confrontation law since *Jensen I* that the court was required to apply, Julie's statements were no longer testimonial. (R. 743:6–31; 945.)

The circuit court held that Julie's statements were admissible. (R. 946:73–79, Pet-App. 116–22.) It determined that under *Ohio v. Clark*, 576 U.S. 237, 135 S. Ct. 2173 (2015), and *Michigan v. Bryant*, 562 U.S. 344 (2011), which the Supreme Court had issued since *Jensen I*, the statements were no longer testimonial. (R. 946:73–79, Pet-App. 116–22.) The court also determined that the statements were admissible under the present-sense-impression and statement-of-recent-perception hearsay exceptions. (R. 946:99–101, Pet-App. 123–25.)

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

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

While that motion was pending, the Eastern District granted the motion for clarification. (R. 804.) It held that the State had complied with its order to initiate proceedings to retry Jensen within 90 days. (R. 804:5.) The court declined to

say what it would do if the circuit court reinstated Jensen's conviction, concluding that such a ruling would be an advisory opinion since the court had not yet acted. (R. 804:6.)

The circuit court then granted the State's motion to reinstate Jensen's judgment of conviction. (R. 810, Pet-App. 114; 811; 813, Pet-App. 130–31; 949:7–9, Pet-App. 127–29.) It concluded that there was no need for a new trial because the evidence at it would be the same as it was at Jensen's 2008 trial. (R. 811; 813:1, Pet-App. 130; 949:7–9, Pet-App. 127–29.)

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

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

Jensen appealed. *Jensen v. Pollard*, 924 F.3d 451 (7th Cir. 2019). The Seventh Circuit affirmed, agreeing with the district court that the State had complied with the order granting habeas relief. *Id.* at 455–56. The Seventh Circuit denied Jensen's petition for a rehearing and rehearing en banc. *Jensen v. Pollard*, No. 17-3639, order denying rehearing and rehearing en banc (7th Cir., Nov. 16, 2019).

Jensen then petitioned the United States Supreme Court for certiorari review of the Seventh Circuit's decision. The Court denied Jensen's petition. *Jensen v. Pollard*, __ S. Ct. __, 2020 WL 3492688 (June 29, 2020).

Jensen's appeal and the court of appeals' decision

While Jensen's federal appeal was pending in the Seventh Circuit, he appealed his reinstated judgment of conviction to the court of appeals. (R. 822.) He argued that the circuit court (1) violated his right to a jury trial by reinstating the judgment of conviction without conducting a new trial, (2) had no authority to revisit the admissibility of Julie's statements, (3) violated the federal-court order granting him habeas corpus relief, and (4) was biased against him at his trial. Jensen raised the latter claim to preserve it for future federal habeas proceedings, if necessary. (Pet-App. 112 n.7.)

The court of appeals reversed the circuit court's judgment of conviction. It concluded that the circuit court erred by reinstating the judgment of conviction because it was not permitted to decide that Julie's statements were nontestimonial. (Pet-App. 110–12.) Specifically, the court held that, under *Cook*, both it and the circuit court were bound to follow this Court's 2007 decision holding that the statements were testimonial. (Pet-App. 111.) The court explained that *Cook* holds that only this Court can overrule, modify, or withdraw language from its prior decisions. (Pet-App. 111.)

The court also concluded that, given its decision, it did not need to address whether the circuit court violated Jensen's right to a trial by reinstating the judgment. (Pet-App. 110–11.)

The court did not directly address whether the circuit court had violated the federal court's order granting Jensen habeas relief. But it said that a new trial "was envisioned by

the federal district court when it returned this case to the circuit court with instructions to 'release [Jensen] from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." (Pet-App. 112 (alteration in original) (citation omitted).)

Finally, the court decided that it did not need to address Jensen's claim of judicial bias in light of its decision to grant him a new trial and its prior decision that he had not proven the claim. (Pet-App. 112 n.7.)

STANDARDS OF REVIEW

Whether a decision establishes the law of the case is a question of law that this Court reviews de novo. *State v. Stuart*, 2003 WI 73, ¶ 20, 262 Wis. 2d 620, 664 N.W.2d 82. But since "the law of the case is a question of court practice, and not an inexorable rule," deciding whether to apply it "requires the exercise of judicial discretion." *State v. Brady*, 130 Wis. 2d 443, 448, 338 N.W.2d 151 (1986).

Further, all state courts are bound by decisions of the United States Supreme Court on issues of federal constitutional law. *State v. Jennings*, 2002 WI 44, ¶ 18, 252 Wis. 2d 228, 647 N.W.2d 142. Those courts thus must follow such decisions even when it means deviating from a decision of this Court reaching a different conclusion. *See id*. Whether decisions conflict depends on their scope and meaning. The interpretation of judicial opinions presents a question of law subject to de novo review. *See Teigen v. Jelco of Wisconsin, Inc.*, 124 Wis. 2d 1, 5, 367 N.W.2d 806 (1985).

Whether the admission of a hearsay statement from an unavailable witness violates a defendant's right to confrontation is also question of law subject to de novo review. *See State v. Reinwand*, 2019 WI 25, ¶ 17, 385 Wis. 2d 700, 924 N.W.2d 184.

ARGUMENT

I. The court of appeals erroneously concluded that *Cook* required the circuit court to follow *Jensen I*'s holding that Julie's statements were testimonial.

This Court should first conclude that the court of appeals erred by determining that, under *Cook*, the circuit court had to follow *Jensen I*'s holding that Julie's statements were testimonial. The law-of-the-case doctrine, not *Cook*, controls whether the circuit court could revisit this Court's prior decision. An exception to the doctrine allows courts to disregard prior appellate decisions when, as here, the controlling law has changed. And the circuit court needed to apply the current confrontation law when ruling on the admissibility of Julie's statement. The court of appeals was thus wrong to conclude that the circuit court was bound by *Jensen I*.

A. Only *Jensen I* establishes the law of the case that Julie's statements were testimonial.

Initially, this Court should conclude that *Jensen I* is the only decision that established the law of the case that Julie's statements were testimonial. The court of appeals did not hold otherwise. But Jensen argued below that the federal decisions addressing his claim also held that Julie's statements were testimonial and that they also bound the circuit court. The State anticipates that he will make the argument again, so it addresses it here.

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

by an appellate court establishes the 'law of the case.'" *Brady*, 130 Wis. 2d at 448 (alteration in original) (citation omitted).

Application of the doctrine "turns on whether a court previously 'decide[d] on a rule of law.'" *Stuart*, 262 Wis. 2d 620, ¶ 25 (alteration in original) (citation omitted). When determining whether a prior decision establishes the law of the case, a court should look to the issues presented in that case. *See id.* ¶ 27.

Jensen I unquestionably establishes the law of the case on whether Julie's statements were testimonial. But neither *Schwochert* nor *Clements* decided this issue, so those decisions do not establish the law of the case.

The district court never addressed or resolved whether Julie's statements were testimonial because the parties did not dispute that they were. *Schwochert*, 2013 WL 6708767 *6. Instead, the court considered whether *Giles* applied, whether Jensen might have forfeited his right to confront Julie by keeping her from testifying at a family-court proceeding, and whether the admission of her statements was harmless error. *Id.* at *6–17. The court's decision does not establish the law of the case on whether Julie's statements are testimonial.

The Seventh Circuit also did not address whether the statements were testimonial. *Clements*, 800 F.3d at 899–908. It, like the district court, rejected the State's argument that *Giles* should not apply. *Id.* at 899–901. The court then upheld the district court's ruling that the admission of the statements was not harmless. *Id.* at 901–08. The court did not consider whether Julie's statements were testimonial, presumably because, again, the parties did not dispute that they were. Thus, the Seventh Circuit's decision does not establish the law of the case on whether the statements were testimonial.

Because only *Jensen I* establishes the law of the case on whether Julie's statements are testimonial, this Court should limit its analysis to whether the circuit court could revisit that decision.

B. The law-of-the-case doctrine and its exceptions, not *Cook*, control whether the circuit court could revisit this Court's ruling in *Jensen I*.

The court of appeals erred when it held that *Cook* required both it and the circuit court to adhere to this Court's ruling in *Jensen I* that Julie's statements were testimonial. An exception to the law-of-the-case doctrine allows courts to revisit prior appellate rulings in the same case when the controlling law has changed since the earlier decision. The controlling law defining "testimonial" has changed since *Jensen I*. Thus, the circuit court could revisit this Court's prior decision. And *Cook* does not hold otherwise.

"The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" *Stuart*, 262 Wis. 2d 620, ¶ 23 (citation omitted). But there are "certain circumstances, when 'cogent, substantial, and proper reasons exist,' under which a court may disregard the doctrine and reconsider prior rulings in a case." *Id.* ¶ 24 (citation omitted).

For example, "a court should adhere to the law of the case 'unless. . . controlling authority has since made a contrary decision of the law applicable to such issues,'" *id.* (citation omitted), or controlling authority has been modified, *Welty v. Heggy*, 145 Wis. 2d 828, 839, 429 N.W.2d 546 (Ct. App. 1988). "[A]n intervening change in the law, or some other special circumstance" can justify reexamining a claim. *United States v. Story*, 137 F.3d 518, 520 (7th Cir. 1998) (quoting

United States v. Thomas, 11 F.3d 732, 736 (7th Cir. 1993)). In addition, an incorrect prior decision may be grounds for disregarding the law of the case. *See McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300, 305 (1929).

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

In *Mullen v. Coolong*, the court of appeals, in a published decision, reversed a grant of summary judgment in favor of an insured and, instead, ruled that the insurance company was entitled to summary judgment. 153 Wis. 2d 401, 403–04, 451 N.W.2d 412 (1990). The court's decision depended on an interpretation of a statute governing car insurance coverage. *Id.* This Court denied the insured's petition for review. *Id.* at 404. But, before it did so, this Court accepted a case that involved interpreting the same statute. *Id.* In that case, this Court eventually reached a conclusion that would have been favorable to the insured in *Mullen*. *Id.* at 404–05. But by the time of the later decision, the parties had settled the case and the circuit court had dismissed it. *Id.* at 405.

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

This Court reversed. *Id.* at 408–11. It rejected "the proposition that a trial court lacks authority under any circumstances to grant relief following a remittitur from a court of last resort." *Id.* at 410. Instead, this Court held that

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

To support its conclusion, this Court relied on its decision in *Brady*. *Id.* at 410–11. That decision also shows that the circuit court here properly decided to revisit *Jensen I* based on a change in the controlling law.

In *Brady*, a circuit court suppressed evidence as the fruits of an illegal arrest, the court of appeals affirmed in a published decision, and this Court denied review. *Brady*, 130 Wis. 2d at 445–46. Afterwards, the United States Supreme Court decided *United States v. Leon*, 468 U.S. 897 (1984), which recognized a good-faith exception to the exclusionary rule. *Brady,* 130 Wis. 2d at 446. The State asked the circuit court to reconsider its suppression decision in light of *Leon*, but it declined to do so, concluding that the court of appeals' decision was the law of the case. *Id.* The court of appeals certified the State's appeal to this Court. *Id.*

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

Thus, this Court has held that a circuit court has the authority to revisit prior appellate decisions, even when those decisions are published, binding precedent. *See* Wis. Stat. § 752.41(2); *State v. Hayes*, 2004 WI 80, ¶ 14 n.9, 273 Wis. 2d

1, 681 N.W.2d 203. And it does not matter that the prior opinions in *Mullen* and *Brady* were court of appeals opinions and this case involves a decision of this Court. The court of appeals' published decisions bind every court in this state, including this one. *Hayes,* 273 Wis. 2d 1, ¶ 14 n.9. Thus, this Court's decisions establish that a circuit court can revisit prior appellate rulings in a case when the controlling law has changed.

Cook does not hold otherwise. That decision says that only this Court can overrule, modify, or withdraw language from Wisconsin's precedential court opinions. *Cook*, 208 Wis. 2d at 189. The decision does not address the law-of-the-case doctrine and lower courts' obligations to follow prior appellate rulings in the same case. Rather, this Court's concern in *Cook* was whether the court of appeals was obligated to follow its own published decisions when the same issue arose in other cases. *Id*. at 185–89. *Cook* does not foreclose lower courts from revisiting a ruling from a higher court in the same litigation when the controlling law has changed in the meantime.

This interpretation of *Cook* is further supported by this Court's subsequent decisions. This Court has never interpreted *Cook* to overrule or modify the law-of-the-case doctrine as explained in *Mullen* or *Brady* or other cases. Instead, this Court has relied on *Brady* when discussing the law of the case in decisions postdating *Cook*. *See, e.g., State v. Moeck*, 2005 WI 57, ¶ 25, 280 Wis. 2d 277, 695 N.W.2d 783; *Stuart*, 262 Wis. 2d 620, ¶ 24.

In addition, *Cook* is not the ironclad rule that the court of appeals described it as. This Court has recognized that lower courts must disregard decisions of this Court when they conflict with decisions of the United States Supreme Court on issues of federal constitutional law. *See Jennings*, 252 Wis. 2d 228, ¶¶ 3, 18. The Supremacy Clause of United States

Constitution requires lower courts to follow the Supreme Court's decisions in that situation. *Id.*

This requirement applies here. The circuit court was required to apply current confrontation law when Jensen asked it to exclude Julie's statements in anticipation of the retrial. If the State is correct that current law, as established by the United States Supreme Court, conflicted with the law applied in *Jensen I*, then the circuit court had to follow it rather than this Court's decision.

Indeed, the court of appeals recognized in *Jensen II* that it was not required to follow *Jensen I* if it conflicted with more-recent Supreme Court precedent. The court in *Jensen II* followed the Supreme Court's holding in *Giles* that the Confrontation Clause applies only to testimonial statements, though doing so meant deviating from *Jensen I*, 299 Wis. 2d 267, ¶ 12 n.5, and *State v. Manuel*, 2005 WI 75, ¶ 60, 281 Wis. 2d 554, 697 N.W.2d 811. *Jensen II*, 331 Wis. 2d 440, ¶¶ 24–26. The court reasoned that "the Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law, although it means deviating from a conflicting decision of our state supreme court." *Id.* ¶ 26 (citing *Jennings*, 252 Wis. 2d 228, ¶ 3).

But the court of appeals ignored this principle in its most-recent decision. It also ignored the exception to the law-of-the-case doctrine that allowed the circuit court to revisit *Jensen I* based on a change in the controlling law. The court's conclusion that *Cook* bound the circuit court to follow this Court's prior ruling was wrong. This Court should reverse that decision.

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

This Court should next conclude that changes in confrontation law since *Jensen I* show that the decision's conclusion that Julie's statements are testimonial is no longer good law. The United States Supreme Court has narrowed the definition of testimonial since *Jensen I*, and this Court had adopted those changes. Under this narrower definition, Julie's statements are no longer testimonial. Thus, the circuit court could properly revisit this Court's decision based on these changes in the law. And even if the circuit court needed to follow *Jensen I*, this Court can reassess that decision based on the current law.

A. This Court applied a broad definition of testimonial in *Jensen I* based on then-current confrontation law.

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

Jensen I summarizes the state of confrontation law as it existed at the time of the decision. *Crawford*, decided in 2004, "fundamentally changed the Confrontation Clause analysis." *Jensen*, 299 Wis. 2d 267, ¶ 14. Under *Crawford*, the government cannot introduce testimonial statements against a defendant "unless the declarant is unavailable and the defendant has had a prior opportunity to [cross-]examine the declarant." *Id.* ¶ 15.

But *Crawford* "did not spell out a comprehensive definition of what 'testimonial' means." *Id.* ¶ 16. Rather, the Court provided three general formulations. The first is ex parte testimony or its equivalent. *Id.* ¶ 17. The second is

extrajudicial statements in formalized testimonial materials, like affidavits, prior testimony, depositions, or confessions. *Id*. And the third is "[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*. (citation omitted).

This Court adopted these three formulations in *Manuel*, 281 Wis. 2d 554, ¶ 39. *Jensen*, 299 Wis. 2d 267, ¶ 18. There, under the third formulation, a witness's statements to his girlfriend implicating Manuel in a crime were not testimonial. *Id*. This was because "statements made to loved ones or acquaintances . . . are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks." *Id*. (internal quotation omitted) (citation omitted).

In 2006, in a joint opinion in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006) (*Davis*), the Court refined *Crawford*'s definition of testimonial in what has become known as the "primary-purpose test." Under that test, applied there to statements in response to law-enforcement interrogations, such statements are not testimonial when the circumstances objectively indicate that "primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id*. at 822. But when the circumstances show that there is no emergency, and that the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," then the statements are testimonial. *Id*.

Accordingly, at the time of *Jensen I*, this Court and the United States Supreme Court had concluded that, under *Crawford*'s third formulation, nonemergency statements to law enforcement were testimonial. Emergency statements to law enforcement and statements to friends and family were not testimonial.

2. This Court concluded in *Jensen I* that Julie's statements fall within the broad definition adopted in that decision.

In *Jensen I*, this Court assessed whether Julie's statements fell under the third *Crawford* formulation. 299 Wis. 2d 267, ¶ 20. It considered the controlling case law, case law from other jurisdictions, the parties' positions, and the two "standard schools of thought of *Crawford*'s intended breadth and scope." *Id.* ¶¶ 20–25. The Court adopted a "broad" definition of testimonial: "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Id.* ¶¶ 24–25 (citation omitted).

Applying this standard, the Court held that Julie's statements were testimonial because a reasonable person in her position would have anticipated that the letter "would be available for use at a later trial." *Id.* ¶ 27. The letter's contents and the circumstances surrounding it "make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death." *Id.*

The Court rejected the State's argument that Julie's letter was not testimonial because no crime had been committed when she wrote it. *Id.* ¶ 28. The definition that it had adopted focused on whether the declarant would foresee that the statement might be used in an investigation or prosecution of a crime, and whether a crime had already been committed was irrelevant to that standard. *Id.*

Next, the Court compared Julie's letter to Lord Cobham's letter implicating Sir Walter Raleigh. *Id.* ¶ 29. It said that Julie's letter, while not as formal as Cobham's, was nonetheless testimonial because it "clearly implicates Jensen in her murder." *Id.* Were the Court to rule otherwise, it said,

accusers could "make statements clearly intended for prosecutorial purposes" without ever being confronted about them. *Id*.

Finally, the Court determined that, "[f]or many of the same reasons" Julie's voicemails to Kosman were also testimonial. *Id*. ¶ 30. It agreed with the circuit court that they "were entirely for accusatory and prosecutorial purposes," and Julie did not leave the voicemail for emergency reasons. *Id*.

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

Since this Court decided *Jensen I* in 2007, the Supreme Court has issued five decisions about the confrontation clause.

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

These decisions do not help resolve whether Julie's statements are testimonial. The latter two involved the admission of affidavits in lieu of testimony, and the Court had little difficulty holding that they were testimonial. And *Williams* was a plurality decision, so it is only precedential in cases with substantially similar facts. *State v. Mattox*, 2017 WI 9, ¶ 30, 373 Wis. 2d 122, 890 N.W.2d 256. The facts here are not like *Williams*, so it does not apply.

That leaves *Bryant*, from 2011, and *Clark*, from 2015. Both of these cases focused on whether statements from crime victims were testimonial, and they are relevant here.

In *Bryant*, a shooting victim, in response to questioning from police officers responding to the crime, identified his assailant while he was lying on the ground with a gunshot

wound. He later died. *Bryant*, 562 U.S. at 349. The Court concluded, under *Davis*, that the primary purpose of victim's statement was to allow police to respond to an ongoing emergency, and thus, it was not testimonial. *Id.* at 359–78.

In its decision, the Court clarified that in *Davis*, it had not tried to identify all conceivable statements, even those in response to police questioning, that could be testimonial. *Id.* at 357. "[T]he most important instances" of testimonial statements implicated by the Confrontation Clause "are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Id.* at 358. And, in contrast, statements obtained in response to police questioning conducted with the primary purpose of responding to an ongoing emergency are not testimonial. *Id.*

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

Clark is the Court's most recent decision addressing the definition of testimonial. *Clark*, 576 U.S. 237. There, the Court concluded that a child's statement reporting abuse to his teachers was not testimonial. *Id.* at 246–48. It explained that statements to people other than law enforcement, while not categorically excluded from the Sixth Amendment, are "much less likely" to be testimonial. *Id.* at 246–47.

In its decision, the Court said that, post-*Crawford*, it had "labored to flesh out what it means for a statement to be 'testimonial.'" *Id.* at 244. The Court explained that it had announced the "primary purpose" test in *Davis*. *Id.* at 244–45.

And it "further expounded" on it in *Bryant*, where it held that a statement is testimonial where the "'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* at 244– 45(alteration in original) (quoting *Bryant*, 562 U.S. at 358). Whether the statements were made during an emergency and the formality of the situation are relevant factors to this determination. *Id.*

In *Clark*, the victim's statements to his teachers were not testimonial because the victim made them as part of an ongoing emergency involving his abuse. *Id.* at 246–47. The primary purpose of the conversation was not to gather evidence for prosecution. *Id.* The victim was young, and he was talking to his teachers, not the police. *Id.*

This Court has addressed *Clark* three times. In *Mattox*, it adopted *Clark's* definition of testimonial and identified four factors to guide whether a statement meets it. *Mattox*, 373 Wis. 2d 122, ¶ 32. These are: (1) the formality of the situation producing the statement, (2) whether the declarant makes the statement to law enforcement, (3) the age of the declarant, and (4) the context in which the declarant makes the statement. *Id.* Applying these factors, the court determined that a toxicology report relied upon by a pathologist in determining a victim's cause of death was not testimonial. *Id.* ¶¶ 33–40.

And in *State v. Nieves*, 2017 WI 69, ¶¶ 36–51, 376 Wis. 2d 300, 897 N.W.2d 363, this Court held that a codefendant's statements to a jailhouse informant were not testimonial. In so holding, the court approvingly cited *Bryant*'s and *Clark*'s formulation of the primary-purpose test, *id.* ¶ 40, and concluded that the statements were nontestimonial because they lacked formality, and the codefendant did not make them to law enforcement. *Id.* ¶¶ 36–51.

Most recently, this Court decided *State v. Reinwand*, 2019 WI 25, 385 Wis. 2d 700, 924 N.W.2d 184. Reinwand killed his son-in-law; at trial, the State introduced statements that the son-in-law had made to 15 people saying that he feared that Reinwand would hurt or kill him. *Id.* ¶ 10. Reinwand claimed that these statements violated his right to confrontation. *Id.* ¶15–16.

The Court concluded that the statements were nontestimonial, and thus, their admission did not violate Reinwand's confrontation rights. *Id.* ¶¶ 19–32. It noted that the statements were informal, and the victim did not make them to law enforcement. *Id.* ¶¶ 26–28. Moreover, the statements' context showed that statements were not testimonial. *Id.* ¶¶ 30–31. The victim was "genuinely frightened" when he made the statements, so it was unlikely that he was "attempting to create a substitute for trial testimony." *Id.* ¶ 30. And, the Court said, the victim chose not to tell law enforcement about his fears. *Id.* ¶ 31.

C. *Jensen I*'s definition of testimonial is overly broad compared with the definition used in subsequent case law.

The post-*Jensen I* refinement of the primary-purpose test requiring courts to focus on whether a declarant made a statement as a substitute for trial testimony is a significant change in confrontation law. And a comparison of the law relied on in *Jensen I* and the later-decided cases shows that this Court applied now-incorrect legal principles when it held that Julie's statements were testimonial.

Although the Supreme Court used the phrase "primary purpose" in *Davis*, its definition of testimonial in that case is broader than the one the Court adopted later in *Clark* and *Bryant*. And that broader definition shows that this Court applied now-incorrect law in *Jensen I*.

In *Davis*, the Court said a statement made in a response to an interrogation in a nonemergency situation is testimonial when its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In contrast, *Bryant* and *Clark* both say that a statement must be obtained with the primary purpose to create a substitute for trial testimony. *Clark*, 576 U.S. at 244–46; *Bryant*, 562 U.S. at 357. The latter is a much narrower test. Now, the circumstances must show that the questioning and statement in response is meant to create the equivalent of testimony. Previously, it was enough that the statements were potentially relevant to a prosecution.

Jensen I conflicts with the current definition of testimonial. This Court there said that, under *Crawford's* third formulation, "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Jensen*, 299 Wis. 2d 267, ¶ 25 (citation omitted). And the court concluded that Julie's statements met this standard. *Id*. ¶¶ 27, 30.

Jensen I's understanding of what constituted testimonial statements is far broader than the primary-purpose test explained in *Bryant* and *Clark*. Under *Jensen I*, any statement that could potentially later be used in a criminal investigation or prosecution is testimonial. In contrast, *Bryant* and *Clark* require that the circumstances show that the statement is meant to be a substitute for testimony. Hence, the definition of testimonial in *Jensen I* is at odds with the current law.

Jensen I's definition also conflicts with the Supreme Court's directive about what a court should consider when determining whether a statement is testimonial. In *Bryant*, the Court explained that courts should consider all "the circumstances 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. 562 U.S. at 367. This is because the declarant and the questioner are likely to have different and "mixed motives." *Id*. at 367–68. In contrast, *Jensen I* instructs courts to take a much narrower view and consider only whether a reasonable person in the declarant's position would foresee whether the statement would be used in an investigation. *Jensen*, 299 Wis. 2d 267, ¶ 25.

Moreover, *Bryant* and *Clark* both conflict with *Jensen I* about whether nonemergency statements to law enforcement can ever be nontestimonial. *Jensen I* implies that an emergency is the only way such a statement can be nontestimonial. *Jensen*, 299 Wis. 2d 267, ¶¶ 19, 30. *Bryant* and *Clark*, in contrast, recognized that there could be nonemergency situations in which a declarant's primary purpose in making a statement is not to create a substitute for trial testimony. *Clark*, 576 U.S. at 244–45; *Bryant*, 562 U.S. at 366.

Finally, as noted, this Court has followed *Bryant* and *Clark*, specifically adopting the definition of testimonial from those cases. *See Reinwand*, 385 Wis. 2d 700, ¶ 24; *Nieves*, 376 Wis. 2d 300, ¶ 40; *Mattox*, 373 Wis. 2d 122, ¶ 32. And the court has distilled four factors from *Clark* to use in determining whether a statement meets the definition. *Reinwand*, 385 Wis. 2d 700, ¶ 25; *Mattox*, 373 Wis. 2d 122, ¶ 32. Thus, this Court is effectively no longer applying the law it established in *Jensen I*.

D. Julie's statements are not testimonial under current law.

This Court should next conclude that Julie's statements are not testimonial under current confrontation law.

1. Julie's letter

Under *Mattox's* four factors, Julie's letter to Kosman was not testimonial. It was informal. *Mattox*, 373 Wis. 2d 122, ¶ 32. Julie did not make it under oath or in response to police questioning. It was not akin to an affidavit or other statement created with the help of a government official.

Although Julie addressed the letter to law enforcement, that is not determinative. Both *Bryant* and *Clark* indicate that there may be nonemergency situations where statements to law enforcement could be nontestimonial. *Clark*, 576 U.S. at 244–45; *Bryant*, 562 U.S. at 366. This is one such situation. Law enforcement was not involved in creating the letter. Julie wrote the letter on her own. And she was not even reporting a crime since Jensen had not yet committed one. Julie's writing the letter was not an attempt by police to gather evidence of crime. The letter was not the product of the typical police–victim interaction in a criminal investigation and was not an attempt to create a substitute for testimony. This weighs in favor of finding it nontestimonial.

Further, Julie's ongoing relationship with Kosman also suggests that the letter was not testimonial. She and Kosman did not have the usual citizen–law enforcement relationship. Kosman had more than 40 contacts with Julie since 1992 or 1993 about harassing behavior. (R. 834:42, 51–52; 909:51–56.) He had been to her residence about 30 times. (R. 909:53.) Kosman was thus someone Julie could trust to report her concerns to, and he was as much an acquaintance or friend as a police officer. *Reinwand*, 385 Wis. 2d 700, ¶ 30; *Manuel*, 281 Wis. 2d 554, ¶ 53.

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

Finally, the letter's context shows that it was nontestimonial. Julie addressed it to an officer who had been helping her deal with harassing behavior, possibly from her husband, for years. The letter was not the result of any police questioning. Julie did not even give the letter directly to Kosman despite telling him about it; she gave it to a neighbor instead. Julie thus had no way of guaranteeing that police would receive the letter. And, as noted, at the time she wrote it, there was no crime to report, just behavior that Julie thought was suspicious. There is no reasonable expectation that the letter would be a substitute for trial testimony under these circumstances.

Reinwand supports this conclusion. There, the State introduced 15 statements that the victim made before his death expressing his fear that Reinwand would hurt or kill him. *Reinwand*, 385 Wis. 2d 700, ¶ 10. Among them was a statement the victim made to his pastor that he "was 'concerned for his life'" and that "'if he came up dead, that the police should dig deeper'" because "[Reinwand] would be behind it.'" *Id.*

This Court determined that this statement was nontestimonial. *Id.* ¶¶ 27–32. Applying the four factors from *Clark*, the Court first noted that the statement was informal because the victim made it "in the pastor's office at his church, where [the victim] regularly visited after attending services to discuss what was going on in his life." *Id.* ¶ 27. The victim was also not speaking to law enforcement. *Id.* ¶ 28. Age was a neutral factor because the victim was an adult. *Id.* ¶ 29. Finally, the court explained the statement's context showed that it was a conversation with a friend. *Id.* ¶ 30. And the victim "was concerned, stressed, and agitated during these conversations, and . . . he appeared to be genuinely frightened." *Id.* This suggested "that he was expressing genuine concern and seeking advice, rather than attempting

to create a substitute for trial testimony." *Id*.

Julie's letter is like the victim's in *Reinwand*. Both expressed concern that a specific person was going to harm the declarant and said that police should focus their attention on that person if something happened. In neither case had a crime yet been committed. While Julie wrote the letter to law enforcement, she intended that it be delivered to an officer with whom she had a longstanding and trusted relationship. The same is true of the victim in *Reinwand*, who spoke a trusted pastor he regularly confided in. And both the letter and the statement were made by people who were stressed and concerned by their lives' circumstances. Neither declarant was trying to create a substitute for trial testimony. Julie's letter is nontestimonial.

2. Julie's voicemails and in-person statements to Kosman

For similar reasons, Julie's remaining statements to Kosman—the voicemails and the later in-person statements—were also not testimonial.

In the voicemails, Julie asked Kosman to call her and said that if she died, Jensen would be her suspect. (R. 909:41, 127–28.) In person, Julie told Kosman that she thought Jensen was trying to kill her and make it look like a suicide. (R. 909:45–46.) She said that Jensen would spend a lot of time on the computer and try to hide what he was looking at. (R. 909:44.) Julie also mentioned the letter that she gave to Wojt. (R. 909:45–46.)

Kosman said that Julie was "confused, scared, [and] somewhat emotional" at the start of the in-person conversation. (R. 909:45.) She calmed down the more they talked, and as she did, she said that she thought Jensen would not try to harm her. (R. 909:45–46.) Kosman explained that

he thought Julie "just needed someone to talk to and maybe get some reassurance that everything was going to be okay." (R. 909:45.)

The primary purpose of these conversations was not to create a substitute for trial testimony. They were informal discussions between two people who had an ongoing relationship addressing suspicious events in one of their lives. True, Julie made these statements to police, but this was not a typical police–citizen interaction involving a crime investigation. Julie "just needed someone to talk to." (R. 909:45.) Julie's statements were a product of her being scared and confused and needing reassurance from an authority figure who knew her situation and who had helped her before. They were not a deliberate or calculated attempt to accuse Jensen of anything, let alone build a criminal case against him.

Reinwand again shows that these statements were nontestimonial. Julie spoke to a trusted friend and expressed her fears that a family member might harm her. She was scared and needed to confide in someone. Julie, like the victim in *Reinwand*, said that police should suspect the family member if something happened. The only difference in the statements is that Julie addressed hers to law enforcement. But, as explained, that alone is not enough to make the statements testimonial, and that is particularly true here given Julie's longstanding relationship with Kosman. Julie's statements were nontestimonial.

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The definition of testimonial has narrowed since *Jensen I* such that Julie's statements are no longer testimonial. The circuit court thus could properly revisit *Jensen I*'s holding under the law-of-the-case doctrine. And, even if the circuit court erred, this Court can reach the same conclusion by

applying current confrontation law. The admission of Julie's statements would not violate Jensen's right to confrontation.

III. This Court should remand to the court of appeals to consider the remaining issues.

Finally, this Court should remand to the court of appeals to address the remaining issues presented by this appeal that the court of appeals did not reach. "In cases where this [C]ourt reverses the court of appeals and the court of appeals did not reach an issue, [this Court] will often remand the case for consideration of the issue not reached." *State v. Wilson*, 2015 WI 48, ¶ 86 n.15, 362 Wis. 2d 193, 864 N.W.2d 52.

Two issues remain that the court of appeals should be allowed to address first. They are (1) whether the circuit court violated Jensen's constitutional rights by reinstating his judgment of conviction without a trial, and (2) whether the circuit court violated the federal district court's order granting Jensen habeas relief by reinstating his conviction.[2] Should this Court agree with the State that Julie's statements are not testimonial under current law, it should remand to the court of appeals to let it consider the issues that it did not reach.

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

CONCLUSION

This Court should reverse the court of appeals' decision and remand for further proceedings.

Dated August 6, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9172 words.

_____
AARON R. O'NEIL
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I hereby certify that:

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I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 6th day of August 2020.

_____
AARON R. O'NEIL
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