August 12, 2019

IN THE SUPREME COURT OF THE UNITED STATES

No. 2019-2020

Bobby Bronner, Petitioner

V.

The State of Olympus, Respondent

On Writ of Certiorari to the Supreme Court of the State of Olympus

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ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

> Issue 1: Whether Bobby Bronner's Fourth Amendment rights were violated by obtaining his cellphone records without a warrant.
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> Issue 2: Whether Bobby Bronner's Sixth Amendment right to confront his accuser was violated by the introduction of Andy Sommerville's hearsay declarations.

SUPREME COURT OF THE STATE OF OLYMPUS

No. 01-76319

BOBBY BRONNER, Appellant

V.

THE STATE OF OLYMPUS, Appellee

On direct appeal from the Superior Court of Olympus

Before Chief Justice DEBRACCIO and Justices BRIGHT, KLOTZ, MUKHERJEE, RABINOVITZ, WALSH, and WORKMAN.

Chief Justice DEBRACCIO delivered the opinion of the Court, joined by Justices KLOTZ, WALSH, and WORKMAN. Justice RABINOVITZ filed a dissenting opinion joined by Justices BRIGHT and MUKHERJEE.

OPINION BY Chief Justice DeBraccio, joined by Justices Klotz, Walsh, and Workman:

I. Order

Petitioner Bobby Bronner (hereinafter "Bronner"), appeals his conviction for human trafficking and possession of child pornography. All of his claims arise under the Constitution of the United States; no claims were brought under the Olympus State Constitution or any Olympus law.[1] We review all questions *de novo*. The judgment of the trial court is

AFFIRMED.

II. Facts

The parties stipulated to the following facts. There are no questions of material facts and no procedural questions implicated by this case. The parties have stipulated that all warrants were issued upon a showing of probable cause. Issues not raised in this opinion are not properly before this Court.

[1] The State of Olympus is the fifty-first state in the United States of America. In Olympus, felony trials are held in Superior Courts. Olympus does not have an intermediate appellate court. Under Olympus law, Petitioner has a right of direct appeal to this Court.

The State of Olympus was selected to host the National Football League's Super Bowl scheduled for February 7, 2016. Large sporting events are widely reported to be associated with increases in human trafficking,[2] and the 2016 Super Bowl was no exception.[3] To combat an expected surge in human trafficking in Olympus associated with hosting this event, the Federal Bureau of Investigation ("FBI") established in 2015 the Human Trafficking Task Force ("Task Force"). The Task Force was headed by FBI Special Agent Carmen Pettitte and Olympus State Police Captains Myles Chaney and Sarah Geesaman. The Task Force involved multiple field offices working with state and local law enforcement agencies as well as officials with Immigration and Customs Enforcement ("ICE"). The primary purpose of the Task Force was to conduct a unified law enforcement campaign against the expected upsurge in human trafficking—especially in the Super Bowl host city, the Olympus capital city of Knerr.

The Task Force investigated a number of suspected sources of human trafficking. Chaney and Geesaman headed the investigation of William DeNolf, who is reputed to be the most significant trafficker in human persons in the western United States. By spring 2015, the Task Force members managed to secure a criminal informant inside DeNolf's operation. This informant, Chester Comerford, provided the Task Force with the names and cellphone numbers of several members associated with running DeNolf's human trafficking operation.

On March 17, 2015, Chaney and Geesaman obtained a warrant (Warrant No. 1) from Olympus Judge Caitlin Wood compelling a local cellular provider, Olympus Cellular, to disclose DeNolf's cellphone records for the prior three months.[4] Using these data in conjunction with the informant's information, the Task Force determined the precise times and locations (within two miles) of cellphones used by persons affiliated with the operation that texted and/or telephoned DeNolf's cellphone. Based on these data, the Task Force began to study how DeNolf's operation engaged in human trafficking—in particular its routes and times of shipment.

On June 18, 2015, the Task Force obtained an additional warrant (Warrant No. 2) from Judge Wood compelling Olympus Cellular to disclose DeNolf's cellphone records for the prior three months. These data, which showed that DeNolf was no longer using his previous number, led the Task Force to conclude that DeNolf and his operation switched to "burner phones."[5] Comerford

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[2] Human trafficking is defined as the illegal trade of human beings, through abduction, the use of threat or force, deception, fraud, or sale, for the purposes of sexual exploitation or forced labor. Human trafficking is estimated by the Federal Bureau of Investigation, to be the third largest criminal enterprise in the world. According to a report issued by the United Nations, at any given time 2.4 million people are trapped in trafficking situations. Of these 2.4 million people trapped in human trafficking, an estimated 1.8 million are sex slaves. 98% of those trafficked for sex (1,764,000) are women or girls. The United States Department of State has estimated that between 600,000 and 820,000 people are trafficked across international borders annually.

[3] There is some debate over whether the Super Bowl is more associated with human trafficking than other large sporting events. However, it is clear that human trafficking is associated with large sporting events when there are a large number of out of town visitors with disposable income who travel without their families.

[4] All data collected came from Olympus Cellular.

[5] Burner phones are disposable cellphones with no registration information. Burner phones are also known as pre-paid phones, while phones used in accordance with a contract are also known as post-paid phones. Burner phones are commonly used to avoid identification by law enforcement.

confirmed the Task Force's suspicions. He reported DeNolf had a burner phone and that he had previously received texts from DeNolf from the burner phone and gave the Task Force the number.

On July 19, 2015, the Task Force obtained a warrant (Warrant No. 3), this time from Judge Riley Grinkis, for every phone number that texted or called DeNolf's phone number for the prior month. These records revealed that DeNolf stopped using the phone that was the subject of Warrants 1 and 2 for everything, except ordering food and communicating with his family. Again, the data collected came from cellphone towers owned and operated by Olympus Cellular.

On August 20, 2015, the Task Force obtained a warrant (Warrant No. 4) from Judge Wood for every phone number that texted or called DeNolf's burner phone number more than five times during the immediately preceding three months.[6] The data collected came from cellphone towers owned and operated by Olympus Cellular. Comerford recognized one of the phone numbers, which was a cellphone licensed to a Bobby Bronner. Comerford told Task Force officials that he "did not know Bronner well" and that he "did not know if Bronner was mixed up" in any of the human trafficking. He informed the Task Force that he had "heard that Bronner frequents a bar in the nearby town of Apollo known as the Lion's Den as well as a brothel in the town of La Grange known as The Home Across the Road." Comerford reported he learned "Bronner likes to eat in a restaurant in Zeusville called Paradise." The Lion's Den is owned by Dr. G. Dr. G is a former debate champ, and Coke Zero aficionado, who goes by the nickname of "Stud" due to his many successes in college debate. The Lion's Den was known for serving rare red-meat. Customers who entered wearing Notre Dame gear could purchase burgers for half-price. Dr. G, a gregarious man known for wrapping his many friends in great bear hugs, insists that the bar's sound system play primarily songs by Neil Diamond, Glenn Campbell, Petula Clark, and the Eagles. Paradise is owned by a local gambler named Frankee Lee. Dr. G and Lee were, according to Comerford, "both pals with DeNolf."

The Task Force supplemented the data collected from cellphone records with Internet research. FBI Special Agent Kari Lyle, a computer forensics specialist who works almost exclusively on cases related to human trafficking, conducted this on-line research. Lyle found several internet sites that listed numerous services for male and female escorts. One of these sites was Backpage.com, an online postings site that sold space for "adult entertainment" services. Several of these ads referred to "Super Bowl Specials." None of these ads included any phone numbers associated with DeNolf or any of his known associates. Two ads, however, instructed potential clients to call and "ask for B.B."

On January 2, 2016 the Task Force obtained a warrant (Warrant No. 5) from Judge Grinkis for every phone number that texted or called Bronner's or DeNolf's burner phone number more than five times during the immediately preceding three months. These data revealed that in December of 2015, Bronner communicated with ten burner numbers associated with DeNolf's phone that were identified in the data collected on July 19, 2015. Given this evidence, Task Force officials

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[6] Cellphone providers differ insofar as how long they retain records for different types of phones (burner vs non-burner) and the data stored (e.g., cell towers used by each phone, pictures, text content and details, which refers to numbers associated with sending/receiving texts, subscriber information, records of incoming and outgoing call length and numbers). For information related to data stored by several major service providers see Appendix I. Olympus Cellular has data storage policy similar to Verizon's policies.

began to focus their investigation on Bronner's phone almost exclusively in the weeks leading up to the Super Bowl.

Starting on January 16, 2016, Chaney and Geesaman, who had grown concerned that time was of the essence, asked a representative of Olympus Cellular to tell them in real time every time Bronner's cellphone was within five miles of ten specific addresses (three in Knerr, three in La Grange, two in Apollo, and two in Zeusville) and to provide every number he communicated with when within ten miles of those addresses. They requested this information without a warrant or any other court order. Olympus Cellular—convinced by Chaney and Geesaman that the safety and health of the community were at risk—complied. Chaney and Geesaman collected data for the following dates: January 16, 17, 18, and 19, and January 21, 22, 23, and 24. They did not collect data for January 20. Based on these data, Chaney and Geesaman narrowed their focus to eight burner phones.

On January 25, they obtained a warrant (Warrant No. 6) from Judge Wood to track in real time whenever these eight cellphones, plus Bronner's and DeNolf's cellphones, were within five miles of the same ten addresses. This warrant covered the dates January 26 through January 31.

On February 1, Chaney and Geesaman then obtained an additional warrant (Warrant No. 7) from Judge Grinkis to collect all the numbers that contacted or were contacted by these eight burner phones as well as Bronner and DeNolf's phones from February 1 through February 7. That same day, Olympus Cellular reported that the eight phones covered by Warrant No. 7 were no longer operational.

Late on the night of February 2, Chaney and Geesaman contacted Comerford who told them that Bronner had texted him from a number he had not seen before. This text informed Comerford that DeNolf was changing phones every week so as to avoid having his calls tracked by the police.

On February 3, Chaney and Geesaman, without a warrant, instructed employees of the cellphone provider to provide them with all of the numbers that had contacted or been contacted by Bronner's new phone during the five (5) days leading up to the Super Bowl Game (February 3-7).

On February 5, Chaney and Geesaman heard a rumor from Comerford that much of the DeNolf operation would leave town after the Super Bowl to head for Las Vegas to a prize fight.

On February 6, Agent Lyle reported to Chaney and Geesaman that she had seen two advertisements on Backpage.com that read: "if you are going to the Heavyweight Championship fight in Las Vegas on February 9 to call and ask for B.B."

On February 7, Chaney and Geesaman, without a warrant, requested that Olympus Cellular provide them, in real time, with every number that contacted or was contacted by Bronner between 12:00 p.m. and 10:00 p.m. and the current location within 2 miles of every one of these phone numbers. This request produced 100 phone numbers. Chaney and Geesaman also obtained every number within five miles that were contacted or had contacted these 100 numbers. This request yielded an additional 200 numbers. After concluding that 50 of these 300 numbers were not connected to human trafficking, state, local, and federal law enforcement officials, aided by Olympus Cellular, located and arrested 50 individuals: 40 who were alleged to be clients of DeNolf's operation, and 10 who were alleged to be associates of DeNolf in human trafficking.

DeNolf was not among those arrested; however, Bronner was arrested on February 9, 2016, and charged with crimes related to human trafficking. When Chaney and Geesaman arrested Bronner, on February 9, 2016, they interviewed his wife Andrea Sommerville, and her eight-year old son Andy Sommerville (hereinafter "Andy Sommerville"), who is Bronner's step-son. Both denied knowing anything about the allegations against Bronner. Tragically, before officers could interview Bronner's step-daughter Samantha Sommerville (age 16), she was in a car accident that left her in a coma.

Chaney and Geesaman conducted interviews with Andrea Sommerville's co-workers and friends, as well as interviews with her children's teachers, classmates, friends, basketball coaches, school officials, and a School Resource Officer ("SRO") at Andy Sommerville's school named Chris Rael (hereinafter "Officer Rael" or "Rael").[7] Officer Rael's comments to law enforcement about conversations he had with Andy Sommerville led prosecutors to call Officer Rael to testify at trial.

Officer Rael told law enforcement officials that on **Wednesday,** February 10, 2016, he had "grown worried about Andy Sommerville;" but not about the safety of other students. Officer Rael was "well-acquainted" with Andy Sommerville having been in his classroom several times since Andy Sommerville had started kindergarten. In addition, Officer Rael had once broken up a fight over a dispute in a kickball game between Andy Sommerville and boy named Jay Bird. Officer Rael helped mediate their differences and the two were now good friends.

According to Officer Rael, Andy Sommerville was usually a very lively kid who had lots of friends. However, on the Wednesday in question, "Andy Sommerville appeared sullen and during recess he kept to himself, did not make eye contact with others, did not eat his lunch, and his eyes appeared red and moist as if he had been crying." Officer Rael was wearing his police uniform that day, which he estimated he wore to school no more than four or five times an academic year. He asked Andy Sommerville if he was okay and if he needed any help. Andy Sommerville replied, "I am fine." The next day, Thursday, February 11, 2016, Andy Sommerville appeared at Officer Rael's office. The office contained a desk, a phone, two filing cabinets, and two chairs for guests to sit in. The walls were mostly barren except for three posters featuring McGruff the Crime Dog, Smokey the Bear, and the Energy Hog. There was nothing on the walls that specifically identified Officer Rael as a police officer. Officer Rael was wearing what SROs generally describe as a "soft uniform."[8] At this time, Andy Sommerville asked if they could talk. During this talk, Andy Sommerville told Officer Rael that something was bothering him—something he did not quite understand. According to Officer Rael's court testimony, Andy Sommerville told him:

> A couple of nights ago I was home alone so I turned on the TV. One of Bobby's dirty movies started playing. It was called "Super Bowl Party." It was gross, just

[7] According to the United States Department of Justice's Community Oriented Policing Services Website, School Resource Officers (SROs) are "sworn law enforcement officers responsible for safety and crime prevention in schools." SROs are typically employed by local police departments, sheriff's agencies, or school systems. Their purpose is to "work closely with school administrators in an effort to create a safer environment." SRO responsibilities "are similar to regular police officers in that they have the ability to make arrests, respond to calls for service, and document incidents that occur within their jurisdiction." In addition to performing law enforcement duties, SROs "serve as educators, emergency managers, and informal counselors." SROs do not administer discipline in or outside the classroom; discipline is left to school officials.

[8] This uniform consisted of khaki pants, and a navy blue, golf shirt. The shirt was embroidered with a star. While in this uniform, he had a police radio on his belt. He did not carry a firearm while in this uniform.

> like the other ones. But this one had men and kids in it. Some of the kids were my age. I was about to turn it off when I saw Samantha. I'm sure it was her. Some naked guy was holding her. She was trying to get away. She was screaming but no one helped her. All the guys in the scene were laughing. It was awful. I turned it off, but I can't stop thinking about it.[9]

Andy Sommerville asked what might happen now that Bronner had been arrested—in particular "will he go to jail?" Officer Rael told Andy Sommerville that he did not know the answer to that question. Officer Rael did not take notes during his talk with Andy Sommerville, but he recorded his recollections in a notebook after the boy left his office. Immediately after completing his notes, Officer Rael placed a call to a counselor who worked for the school district and was waiting to hear back from the counselor. He also placed a call to Andy Sommerville's principal, Dr. Shea Fore, and was waiting to hear back from Dr. Fore. He did not contact any law enforcement officers. By coincidence, Captains Chaney and Geesaman arrived at the school two hours after Andy Sommerville met with Officer Rael. When they came to Officer Rael's office, he told them about his conversation with Andy Sommerville, stressing that he was worried about Andy Sommerville's welfare. Chaney and Geesaman asked if Andy Sommerville knew that Officer Rael was a law enforcement officer. He told Chaney and Geesaman that Andy Sommerville had never asked him directly about it, but that "he might think I am – at least on the days that I wear my traditional uniform." Bronner's charges were amended to include possession of child pornography.

Under Olympus law, children must be at least ten years old in order to testify in court. The statute establishing this minimum age, co-sponsored by Senator Ryan Manners and Delegate Wyatt Rice, was intended "to protect the physical and psychological well-being of victims under ten years of age associated with testifying in court about painful experiences including sexual and physical assault." The law permits no exceptions to the minimum age requirement—even if the child states a preference to testify. Moreover, the law did not require that the child be observed or interviewed by the judge or by mental health personnel before being excused from testifying. By the time the case came to trial, Andy Sommerville was nine-years-old. In the past, Andy Sommerville assisted his sister, Samantha, at practice for high school mock trial. Both of Samantha's cases concerned issues related to the criminal justice system (one was a Fourth Amendment case and the other involved the Fifth Amendment). Andy Sommerville stated he knows that lying is bad and that he believes that if he tells a lie then he is sinning and that God will punish him for his sins.

Bronner was tried in an Olympus state court. Before the trial commenced, Bronner moved to suppress the tracking data obtained from the Olympus Cellular on the grounds that a warrant was required for all the searches. Bronner also challenged some of the evidence seized with a warrant. In particular, he argued that the Fourth Amendment forbids seizing records for a three-month period and tracking a cellphone in real time for six straight days.

Bronner contends the search violated his Fourth Amendment rights. Olympus State Superior Court Judge D.R. Fair determined that Bronner did not have a reasonable expectation of privacy in his movements and denied Bronner's motion to suppress. The cellphone evidence was later admitted into evidence at trial.

[9] Despite their best efforts, law enforcement officials never found any evidence of "Super Bowl Party." Nor could they find anyone who could corroborate Andy Sommerville's story.

During trial, Bronner objected to the admission of Officer Rael's testimony regarding his conversation with Andy Sommerville on the grounds that Andy Sommerville's statements constituted inadmissible hearsay and that precluding Andy Sommerville from testifying at trial violated Bronner's Sixth Amendment right to confront witnesses. Judge Fair overruled Bronner's objection and allowed Officer Rael to testify. Bronner's attorneys did cross-examine Officer Rael.

Officers Chaney and Geesaman testified that they obtained statements from fifty individuals whose phone numbers were found in the list of calls made on Super Bowl Sunday. Olympus law enforcement officials admitted they would not have been able to interview these individuals without the information obtained from Olympus Cellular for Super Bowl Sunday. Ten of these individuals testified in court. One, a local grifter of some renown named Alfie Sasaki, testified that he had heard that Bronner possessed child pornography, but acknowledged that he had never seen any of Bronner's child pornography collection. The other nine witnesses testified to Bronner's involvement in human trafficking.

A jury returned a guilty verdict on both the human trafficking and possession of child pornography charges. Judge D.R. Fair sentenced Bronner to 30 years in an Olympus state correctional facility. Bronner appealed his conviction to this Court on the grounds that his Fourth and Sixth Amendment rights were violated. We now examine his claims in turn.

III. Fourth Amendment Issue

Bronner asserts that the seizure of his cellphone records violated his Fourth Amendment rights. Based on the following analysis of the Court's standards regarding the restrictions placed on searches and seizures by the Fourth Amendment, we AFFIRM the trial court's denial of the motion to suppress and consequently hold that Bronner's Fourth Amendment rights were not violated.

A. Seizure of Cellphone Records

For the past 50 years, our Fourth Amendment jurisprudence has been guided by the reasonable expectation of privacy standard established in *Katz v. United States*, 389 U.S. 347 (1967). Bronner's conviction must be affirmed because he did not have a reasonable expectation of privacy in the records of his cellphone calls.

The United States Supreme Court has ruled on several occasions that there is no expectation of privacy in records that were in the possession of third parties, with the possible exception of those involving privileged relationships. In *Smith v. Maryland*, 442 U.S. 735 (1979), for example, the Court specifically addressed telephone records. There, law enforcement installed a "pen register" on telephone company equipment used to record the numbers dialed on a telephone. The pen register did not record the content of telephone conversations. The Court ruled that people realize they must convey the numbers they dial to the telephone company; hence they have no expectation of privacy. *Carpenter v. United States*, 138 S. Ct. 2206 (2018) left open whether the third-party doctrine applied in real-time as well as to numbers dialed or texted or to numbers from which one receives a call or a text. We are of the opinion that it does apply to such situations/data.

It is unarguably true that the technology used here is far more sophisticated than the "pen register" whose warrantless use was ruled constitutional in *Smith*. To address the rise of advancing technology, the Court in *Kyllo v. United States*, 533 U.S. 27 (2001), established an analytical

framework for determining whether certain new technologies can be used by law enforcement officers without a warrant. The Court ruled: "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 41. Here, the technology used by cellphone carriers to recover dialed phone numbers is clearly in "general public use."

Finally, in *United States v. Jones*, 565 U.S. 400 (2012), the most recent Supreme Court case on the issue of covert surveillance of vehicles, the Court breathed new life into the trespass doctrine. In *Jones*, officers surreptitiously placed a GPS device on the undercarriage of a car for 28 days in order to track its movements. The Court held "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.* at 404. The Court went on to note: "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* at 404-405. In contrast to *Jones*, no relevant action in the present case can be characterized as a trespass. We therefore conclude that no search took place.

B. Exigent Circumstances

The State admits that some of the evidence in this case was obtained without a warrant. Captains Chaney and Geesaman persuaded Olympus Cellular employees to give them records by telling them that "the safety and health of the community were at risk."

The Supreme Court most recently visited the exigent circumstances doctrine in *Kentucky v. King* 563 U.S. 452 (2011). There, the Court noted there are three situations where exigent circumstance would allow officers to dispense with obtaining a warrant: emergency aid, hot pursuit, and preventing destruction of evidence. The Court reasoned: "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." *Id.* at 462. We arrive at a similar conclusion. The law enforcement officials in Olympus reasonably believed that evidence would be destroyed. We reject the argument that they impermissibly created the exigency by deliberately evading the warrant requirement because the investigation centered around the date of the Super Bowl; a weekend notorious for high volumes of trafficking.

In the present case, law enforcement officials made 40 arrests of individuals who were alleged to be clients of DeNolf's operation, and 10 of persons who were alleged to be associates of DeNolf in human trafficking. Law enforcement had reason to suspect the operation was relocating for a time in Las Vegas for a prize fight. The date of this fight was fast approaching when the Task Force acted. Simply put, the exigent circumstances test was designed for situations such as the one before us in the immediate case.

IV. Sixth Amendment Issue

Next, Bronner asserts that the Confrontation Clause required that Andy Sommerville testify against him at trial. Bronner further asserts that under *Maryland v. Craig*, 497 U.S. 836 (1990), testimony by Andy Sommerville via closed-circuit television would have protected him from the trauma of testifying in Bronner's presence.

The Second Circuit Court of Appeals has observed that "[t]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony." *United States v. Gigante,* 166 F.3d 75, 81 (2d Cir. 1999). We do not believe, however, that there is a way to reduce, much less eliminate, the psychological damage that Andy Sommerville would suffer by testifying either in the courtroom or from a remote location[10] -- the video Andy Sommerville saw, "Super Bowl Party," graphically depicted the rape of his sister. There is no way Andy Sommerville could retell what he saw without being re-traumatized; and being subject to cross-examination would exponentially increase his trauma. We conclude the Olympus statute setting a minimum age for children to testify in court is constitutional.

We now turn to the alleged error in admitting Andy Sommerville's hearsay statements through Rael's testimony. *Crawford v. Washington*, 541 U.S. 36 (2004) sets forth the analytical framework concerning the admission of hearsay statements in a criminal trial. The *Crawford* analysis hinges on the determination of whether a statement is testimonial or non-testimonial. If the statement is testimonial, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 69. States are free to establish their own rule restricting the admissibility of non-testimonial hearsay.

While the Court established the testimonial/non-testimonial dichotomy in *Crawford*, the Court did not develop a specific formulation of what constitutes a testimonial statement. In *Davis v Washington*, 547 U.S. 813 (2006), the Court clarified the distinction:

> Statements are non-testimonial 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.

Id. at 822.

Subsequent to *Davis*, the Court decided several Confrontation Clause cases. The most analogous to the case before us is *Ohio v. Clark*, 135 S. Ct. 2173 (2015). *Clark*, like the instant case, concerned an "ongoing emergency" in the context of testimony provided by a minor. There, preschool teachers questioned a 3-year-old boy about injuries he had suffered to determine if it was safe to release the child to Clark, whom the boy had identified as his abuser (*i.e.* the "ongoing emergency"). The Court concluded that "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Id.* at 2180-81.

Here, the fact that Officer Rael was an on-duty police officer is noteworthy, but he was not performing a traditional law enforcement function at the time of his conversation with Andy Sommerville; he was not at the school to investigate crime. Instead, Officer Rael was assigned to the school and frequently interacted with the children in a friendly, non-adversarial role. It is clear that Officer Rael was genuinely concerned about Andy Sommerville's welfare. As such, we

[10] Numerous studies in medical and psychological journals, and even law review journals, attest that juveniles who testify in open court against "loved ones" often suffer significant psychological and/or emotional harm.

conclude the statements at issue were clearly non-testimonial, and thus introducing them at trial did not violate Bronner's Sixth Amendment rights.

V. Conclusion

Because neither the seizure of cellphone records, nor the introduction of Andy Sommerville's hearsay statements at trial violate Bronner's constitutional rights, the conviction is

AFFIRMED.

Justice Rabinovitz dissenting, joined by Justices Bright and Murkherjee:

I. Fourth Amendment Issue

The majority of this body today holds that the seizure of cellphone records was not a search, and in the alternative, if there was a search, it was lawful under the exigent circumstances exception to the warrant requirement. I disagree with both conclusions.

A. Seizure of Cellphone Records

The Supreme Court established the reasonable expectation of privacy test in *Katz v. United States*, 389 U.S. 347 (1967). Since *Katz*, the Court has repeatedly addressed the nuances of balancing the government's interest in effective law enforcement with public safety and the individual's right to privacy. In some cases, the Court has established bright line rules only to later determine that finer tuning was required as advancing technology rendered many distinctions from historical analysis inapplicable to modern life. In the last ten years, the Court has narrowed the scope of older decisions on searches and seizures, sometimes admitting that it is reworking an old rule, and sometimes claiming that the lower courts have misinterpreted Supreme Court decisions for decades. The Court has also established new rules to cope with technological changes that impact how people conduct their daily lives.

On several occasions, the Court has noted that the heightened warrant requirement is not as burdensome as it sounds because technology has made it easier to contact a judge to obtain warrants. For example, in *Riley v. California*, 573 U.S. 373 (2014), the Court reconsidered the application of prior precedent. There, Riley's smart phone, located in his pocket, was seized during a search incident to his arrest. During an impromptu search, officers examined his text messages, photographs, videos, and contact list. The evidence was later used to charge Riley in a shooting unrelated to his original arrest.[11] The Court added a high-tech wrinkle to this doctrine because smart phones made it possible for the suspect to carry far more data than what a person could previously transport. The Court reasoned: "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection

[11] The permissible scope of a warrantless search incident to arrest has remained stable since 1969: without a warrant, officers could search the person being arrested and the area under that person's immediate control at the time of the arrest. Specifically, the search incident to arrest extended to documents a person was carrying, and the entire area within arm's reach, which would include file cabinets or other containers that could contain weapons allowing the suspect to resist arrest or escape. Preventing the destruction of evidence was also a justifiable basis for a search incident to arrest.

for which the Founders fought." *Id.* at 403. Accordingly, the Court mandated a warrant to search the contents of cellphones, subject to the exigent circumstances rule.

In *Missouri v. McNeely,* 569 U.S. 141 (2013), the Court revisited whether a warrant was required to draw a suspect's blood for testing. The typical fact scenario involved a person arrested for driving under the influence of alcohol. Police officers nationwide interpreted Supreme Court precedent to allow warrantless blood draws because natural metabolization of alcohol destroys evidence of intoxication, in effect creating a *per se* exigent circumstance. The availability of telephonic and electronic warrants contributed to the Court's decision to update the rule. The Court held: "[I]n drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 165.

Most recently, the Court decided *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which involved obtaining cell-site location information (CSLI) from a person's cellphone company. Acquisition of CSLI data allows law enforcement agencies to trace where a cellphone has been, (*i.e.* a *de facto* GPS report). The Court held:

> In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

Id. at 2223. As such, a warrant is now required to obtain CSLI. By extension, a warrant should also be required when officers seek to obtain information regarding the locations where cellphone calls were made. Of course, this rule, like all others involving the Fourth Amendment, is subject to the exception for exigent circumstances.

B. Exigent Circumstances

I agree with the majority that *Kentucky v. King*, 563 U.S. 452 (2011) provides the appropriate standard to determine if the exigent circumstances test relieves Captains Chaney and Geesaman from the duty to obtain warrants for their searches. The Court made a point in *King* that is critical in the case before us: "Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." *Id.* at 470. There was no genuine exigency in this case. Indeed, the Task Force obtained *seven* warrants. Thus, the Task Force was clearly familiar with the requisite procedures for obtaining a warrant; and judges were clearly willing to issue the warrants. Simply put, there was ample time to obtain a warrant; but the officers merely chose not to do so. In my opinion, law enforcement created the appearance of exigency. The decision not to obtain all the warrants required makes the evidence that they coerced Olympus Cellular employees to disclose inadmissible in court. Their willful disregard for the Fourth Amendment cannot be permissible constitutional law. The actions of law enforcement officials in Olympus cannot stand.

Therefore, the seizure of Bronner's cellphone records violated his Fourth Amendment rights, and the convictions should be reversed.

II. Sixth Amendment Issue

There are two separate Confrontation Clause issues in this case: admission of hearsay statements and barring children from testifying in a criminal trial. I disagree with the majority on both issues.

A. Barring Children from Testifying

In *Maryland v. Craig*, 497 U.S. 836 (1990), the Court established the framework for analyzing the issue of children testifying in a criminal trial. *Craig* involved a 6-year-old child's testimony and a Maryland law allowing children who are victims of child abuse to testify by one-way closed-circuit television if the judge determines that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id*. at 841. The defense retained all procedural rights during trial, including cross-examination, except for face-to-face confrontation with the child witness.

The Court reasoned: "We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial." *Id*. at 844. Consequently, the Court concluded:

> So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed-circuit television procedure for the receipt of testimony by a child witness in a child abuse case.

Id. at 860. While the Confrontation Clause allows accommodations for children who testify for the prosecution in criminal cases, they cannot be excluded solely due to age.

Since *Crawford* was decided, though, the issue presented in *Craig* has been largely ignored by the Court. But this does not mean that *Craig* has been overruled. Numerous state and federal courts have published opinions focusing on testimony given via closed-circuit television. For example, the Eleventh Circuit Court of Appeals in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) noted that for more than a decade federal courts have allowed child abuse victims to testify by closed-circuit television using the *Craig* standards.

Simply put, the Sixth Amendment mandates that the defendant in a criminal case has the right to confront and cross-examine prosecution witnesses. *Craig* established a procedure that is available if there is an individualized determination that a child would be severely traumatized by testifying in the presence of the defendant. Instead, Olympus law categorically prohibits children under 10 from testifying in criminal cases. This is unconstitutional.[12]

B. Admissibility of Andy Sommerville's Hearsay Statement

In *Crawford v. Washington*, 541 U.S. 36 (2004), after a comprehensive historical review of the right to confront one's accusers, the Court concluded the Sixth Amendment's primary objective

[12] The majority refers to "Numerous studies in medical and psychological journals, and even law review journals, attest that juveniles who testify in open court against "loved ones" often suffer significant psychological and/or emotional harm." *Supra* at 9 n.10 (majority opinion). Yet, there is also a trove of studies found in those same publications arriving at contrary findings where appropriate safeguards are provided, such as allowing children to testify by closed-circuit television. Olympus law does not utilize, let alone permit, such safeguards.

was to control the use of testimonial hearsay at trial, and "interrogation by law enforcement officers fall squarely within that class." *Id*. at 53.

The Supreme Court has yet to apply the unavailability prong of *Crawford* to testimony by juveniles. The Florida Supreme Court, in *State v. Contreras,* 979 So. 2d 896 (Fla. 2008), however, reviewed numerous cases that concluded juveniles can be "unavailable" under *Crawford* due to mental or emotional harm caused by testifying. *Id.* at 906–07. The determination of unavailability requires a case-by-case evaluation, and it cannot be based on a single factor such as age.

The Court revisited the Confrontation Clause in *Davis v. Washington,* 547 U.S. 813 (2006), where it analyzed two cases. The first case involved a police officer's testimony about statements made by an alleged victim at a crime scene. The second case concerned the testimony of a 9-1-1 operator about a call from a victim (McCottry) who identified her former boyfriend (Davis) as her assailant. Using the 9-1-1 call as an example, the Court explained that the information the 9-1-1 operator obtained for the purpose of ascertaining facts to enable the police to handle an emergency was non-testimonial. Once the 9-1-1 operator finished obtaining the facts that the officers needed to handle the emergency and went through a battery of questions with McCottry, "[i]t could readily be maintained that, from that point on, McCottry's statements were testimonial." *Id.* 828-829. It is noteworthy that, in *Davis*, the distinction between testimonial and non-testimonial statements was rooted in the mental state of the person taking the statement—not the person making the statement.

Classifying hearsay as testimonial or non-testimonial worked well for the Court in *Crawford* and *Davis*, even if it outraged advocates for battered women who failed to appear in court. The classification developed was workable in the cases involving forensic analysis of evidence recovered by police officers, although it prolonged trials and inconvenienced forensic personnel who previously were not required to testify.

The *Davis* framework was modified in *Ohio v. Clark,* 135 S. Ct. 2173 (2015), where the Court heard a dispute over statements that teachers extracted from a 3-year-old boy regarding who caused his injuries. In *Clark* there were three consecutive questioning sessions, each by a progressively higher level of preschool staff. The Court characterized them as informal and spontaneous, and focused on the intent of the 3-year-old hearsay declarant. Anyone familiar with young children will recognize that this analysis is ludicrous. Moreover, the Court found the interrogators being teachers to be "highly relevant." *Id*. at 2182. Here, the questioner was a member of law enforcement—that is a distinction of constitutionally significant difference.

The Supreme Court of Kansas adopted a well-reasoned approach in *State v. Henderson,* 160 P. 3d 776 (Kan. 2007). That body concluded that the admissibility of child abuse victim statements is not determined exclusively by the child's "awareness, or lack [thereof], that her statement would be used to prosecute," but that "is one factor to consider." *Id*. at 785. I agree.

Similarly, the Supreme Court of Arkansas in *Seely v. State,* 282 S.W. 3d 778 (Ark. 2008) focused on the additional circumstances that surrounded the questioning and objective indications of the primary purpose of the statement. The court there suggested the following set of rebuttable presumptions for determining whether a statement is testimonial or non-testimonial:

> Where a statement is made to a government official, it is presumptively testimonial, but the statement can be shown to be nontestimonial where the primary purpose of the statement is to obtain assistance in an emergency.
>
> Where a statement is made to a nonofficial, it is presumptively nontestimonial, but can be shown to be testimonial if the primary purpose of the statement is to create evidence for use in court.

Id. at 787. We should apply this clear and useful framework to the instant case. We do so because Officer Rael was a government official, and Andy Sommerville's statements to Rael are presumptively testimonial. Officer Rael may have been genuinely concerned about Andy Sommerville's welfare, but there are no facts indicating that Andy Sommerville needed emergency assistance. The statement to Rael was, therefore, testimonial, and consequently Rael's testimony concerning Andy Sommerville's statements should have been excluded from Bronner's trial.

III. Conclusion

The seizure of Bronner's cellphone records violated his Fourth Amendment rights, and the admission of Andy Sommerville's hearsay declarations violated Bronner's rights under the Confrontation Clause of the Sixth Amendment.

Bronner's convictions should therefore be REVERSED.

Appendix I

Retention Periods of Selected Data by Major Cellular Providers

Materials	Verizon	T-Mobile	ATT/Cingular	Sprint	Nextel
Subscriber Information	3-5 years	5 years	Varies with	Unlimited	Unlimited
Call Detail Records	1 rolling year	Pre-Paid 2 years	Pre-Paid Varies	18-24 months	18-24 months
		Post-Paid 5 years	Post-Paid 5 years		
Cell Towers Used by phone	1 rolling year	A year or more	Since July 2008	18-24 months	18-24 months
Text Message Data	1 rolling year	Pre-Paid 2 years	Post-Paid 5-7	18 months	18 months
		Post-Paid 5 years	years		
Text Message Content	3-5 days	Not retained	Not retained	Not retained	Not retained
Pictures	Only if uploaded	Retained until	Not retained	Unknown	Unknown
	to website	service ends or			
		pictures are			
		deleted			

Source: United States Department of Justice

Issue 1 Cases:

Katz v. United States, 389 U.S. 347 (1967),
https://supreme.justia.com/cases/federal/us/389/347/

Smith v. Maryland, 442 U.S. 735 (1979),
https://supreme.justia.com/cases/federal/us/442/735/

Kyllo v. United States, 533 U.S. 27 (2001),
https://supreme.justia.com/cases/federal/us/533/27/

United States v. Jones, 565 U.S. 400 (2012),
https://supreme.justia.com/cases/federal/us/565/400/

Kentucky v. King, 563 U.S. 452 (2011),
https://supreme.justia.com/cases/federal/us/563/452/

Missouri v. McNeely, 569 U.S. 141 (2013),
https://supreme.justia.com/cases/federal/us/569/141/

Riley v. California, 573 U.S. 373 (2014),
https://supreme.justia.com/cases/federal/us/573/13-132/

Carpenter v. United States, 138 S.Ct. 2206 (2018),
https://supreme.justia.com/cases/federal/us/585/16-402/

Issue 2 Cases:

Maryland v. Craig, 497 U.S. 836 (1990),
https://supreme.justia.com/cases/federal/us/497/836/

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999),
https://law.justia.com/cases/federal/appellate-courts/F3/166/75/629787/

Crawford v Washington, 541 U.S. 36 (2004),
https://supreme.justia.com/cases/federal/us/541/36/

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https://caselaw.findlaw.com/us-11th-circuit/1116453.html

State v. Henderson, 160 P. 3d 776 (Kan. 2007),
https://www.leagle.com/decision/2007936160p3d7761936

State v. Contreras, 979 So. 2d 896 (Fla. 2008),
https://www.leagle.com/decision/20081875979so2d89611873

Seely v. State, 282 S.W. 3d 778 (Ark. 2008),
https://caselaw.findlaw.com/ar-supreme-court/1253941.html

Ohio v. Clark, 135 S.Ct. 2173 (2015),
https://supreme.justia.com/cases/federal/us/576/13-1352/